Sports, Drugs and Rock & Roll

The Evolving Landscape of Drugs and Scandals in Sports and Entertainment

Entertainment, Arts & Sports Law Section
Co-Sponsored by the Food, Drug and Cosmetic Law Section

Thursday, October 18, 2018

Arent Fox

1301 Avenue of the Americas, New York, NY

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NEW YORK STATE BAR ASSOCIATION

SPORTS, DRUGS AND ROCK & ROLL

The Evolving Landscape of Drugs and Scandals in Sports and Entertainment

Sponsored by the Entertainment, Arts and Sports Law and the Food, Drug and Cosmetic Law Sections

Thursday, October 18, 2018

At Arent Fox, 1301 Avenue of the Americas (52nd - 53rd Streets), 42nd Floor, New York, NY

3 hours of CLE credits in Areas of Professional Practice

AGENDA

2:30 – 2:45pm	**Welcome and Introduction** - Barry Skidelsky, Esq. New York, NY (EASL Chair)
2:45 – 4:00pm	**Panel One**: This panel will address the intersection of sports and drug laws, touching on the usage of legal and illegal substances to enhance athletic performance, as well as regulatory issues relating to drug approvals and dietary supplements. 1.5 credits of Professional Practice
Moderator:	**Brian Malkin, Esq.**, Arent Fox, Washington, DC (FDC Chair)
Panelists:	**Rick Collins, Esq.**, Collins Gann McCloskey & Barry, Mineola, NY **Jay Manfre, Esq.,** Collins Gann McCloskey & Barry, Mineola, NY **Cameron Myler, Esq.**, CAS Arbitrator/NYU Professor, New York, NY **Bill Ordower, Esq.**, EVP/GC, Major League Soccer, New York, NY **Adolpho Birch, Esq.**, (invited) SVP/Labor Policy & League Affairs National Football League, New York, NY
4:00 – 4:15pm	**Break**
4:15 – 5:30pm	**Panel Two**: This panel will discuss the legal fallout in entertainment and sports from what has come to be known as the "Me Too" movement. Topics to be covered include morals or scandals clauses, inclusion riders, NDAs, and tips on how to ethically manage a scandal or arrest of a client (including the dilemma between confidentiality and disclosure). *1.5 credits of Professional Practice*
Program Co-Chairs:	**Ann LaBarbera, Esq., Pamela Jones, Esq., Robert Seigel, Esq.**
Moderator:	**Eriq Gardner, Sr. Editor**, The Hollywood Reporter, New York, NY
Panelists:	**Ben Brafman, Esq.**, Brafman & Associates, New York, NY **Greg Chiarello, Esq.**, Outten & Golden, New York, NY **Kalpana Kotagal, Esq.**, Cohen Milstein, Washington, DC **Jennifer O'Sullivan, Esq.**, Arent Fox, New York, NY **Kristin Klein Wheaton, Esq.**, Goldberg Sagalla, Buffalo, NY

5:30 – 7:00pm **Networking Reception**

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Please email Kristina Maldonado at kmaldonado@nysba.org with any questions.

Lawyer Assistance Program 800.255.0569

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

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NEW YORK STATE BAR ASSOCIATION

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The above address is my ☐ Home ☐ Office ☐ Both

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Please designate the committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space permits.

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__ Ethics (EASL3600)
__ Fashion Law (EASL3200)
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__ Legislation (EASL1030)
__ Literary Works and Related Rights (EASL1500)
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__ Music and Recording Industry (EASL1700)
__ Not-for-Profit (EASL4100)
__ Phil Cowan Memorial Scholarship (EASL3500)
__ Pro Bono Steering (EASL3000)
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__ Television and Radio (EASL1100)
__ Theatre and Performing Arts (EASL2200)
__ Website (EASL4000)
__ Young Entertainment Lawyers (EASL2300)

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Attorneys admitted 2016 - 3.31.2018	60

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Attorneys admitted 2011 and prior	$180
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Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

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Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association

*Newly admitted = Attorneys admitted on or after April 1, 2018

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Jay Manfre, Esq.
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Cameron Myler, Esq.
CAS Arbitrator/NYU Professor, New York, NY

Bill Ordower, Esq.
EVP/GC, Major League Soccer, New York, NY

Adolpho Birch, Esq.
SVP/Labor Policies & League Affairs NFL, New York, NY

Busted: Legal Q & A

By Rick Collins, Esq.

Captain America: Juiced-Up Hero?

Q: In the recent "Captain America" movie, a puny kid becomes a muscled-up superhero through injections of a special "serum." Doesn't that sound like a two-hour commercial for gear?

A: The film was based on the Marvel Comics character, who was conceived by writer Joe Simon in 1940 as a consciously political creation. World War II had begun, and the Third Reich was terrorizing Europe under the leadership of Adolf Hitler. The comic book's very first issue showed Captain America, in his patriotic red, white and blue costume, punching Hitler himself in the jaw.

In both the movie and the comic book, Captain America is the alter ego of Steve Rogers, a kid from Brooklyn who's so scrawny and sickly that he is rejected from enlisting to fight the Nazi threat. But he gets a chance to volunteer as a test subject for a top-secret defense project seeking to create physically superior soldiers. Rogers gets injections of a muscle-building, performance-enhancing "serum" that make him bigger, faster and stronger than other men. The injections transform him from a weakling into a super-soldier, and he kicks a whole lot of Nazi butt because of his artificially created abilities. The first issue of the Captain America comic book sold a million copies and launched a character that remains the most patriotic superhero of all, filling movie theater seats (and soon selling DVD's) more than 70 years later!

As to the idea for Simon's fictional serum, the only real-life muscle-building, performance-enhancing serum being actively researched and developed at the time was – you guessed it, the anabolic steroid testosterone. Pharmaceutical researchers in Germany, Switzerland and the Netherlands had only discovered how to isolate and synthesize the compound in 1935. It's rumored that the German athletes, under extreme pressure to win in order to prove Hitler's theory that the Germans were the master race, were juiced on testosterone at the 1936 Olympics in Berlin. It's also believed that testosterone was administered to the Nazi troops during World War II in order to increase their strength and aggressiveness. As far as I know, the U.S. military didn't experiment with steroids on our troops during the Second World War. But in the comics and film, Steve Rogers certainly got a massive dose of the serum, as did his Nazi nemesis. The serum was such a potent performance enhancer that unlike real steroid users, Rogers didn't even need to lift any weights to be juiced!

In 1940 America, it was simple: The U.S. was good and the Nazis were bad. Utilizing chemicals, rather than the hard work of intense training, to create a physically superior person to fight the Third Reich wasn't looked at as bad. But today, when gifted athletes like Barry Bonds, Roger Clemens, and Lance Armstrong are being publicly ridiculed as "cheaters" for their suspected use of secret serums, it's puzzling that American audiences are cheering the strength and stamina of Captain America's fake, serum-created muscles with a deep sense of national pride. Why? Can a chemically enhanced powerhouse still be a beloved hero and a role model for America's impressionable youth? The story of Steve Rogers says, "Yes!" Simply being a fictional character isn't an exemption from ethical rules, otherwise you couldn't tell the heroes from the villains in films or novels. Does Rogers get a pass on juicing because he fights Nazis in a war? Maybe, except that it's not like Rogers' pharmaceutical enhancement is portrayed as an ethical failure justified only for the purposes of a greater good. The pharmacological wizardry itself is glorified and celebrated!

When is a chemically-induced performance advantage "fair" and when is it not? Aren't artificially-created muscles either a fraud under any circumstances or not a fraud at all? Why is the exact

same conduct heroic for a soldier but despicable for an athlete? Isn't the threat of an escalating arms race of chemical enhancement in a World War even worse than in sports? After all, the stakes are far higher so there's even more of an incentive to push the envelope into the danger zone.

The subtitle of the 2008 steroid documentary "Bigger, Stronger, Faster*" was "*The Side Effects of Being American." In the film's footage, then-senator Joe Biden piously asserts that performance-enhancing drugs are "un-American." But Captain America – arguably our nation's original "juicehead" – serves as a reminder to say, "Not always."

Rick Collins, JD, CSCS [*www.rickcollins.com*] is the lawyer that members of the bodybuilding community and nutritional supplement industry turn to when they need legal help or representation.

Framed for Steroids? It can Happen!

By Rick Collins, Esq., CSCS

Anabolic steroids are controlled substances under federal law. Since 1991, it's been a federal crime to unlawfully possess them and it's a felony to unlawfully distribute them or possess them for distribution. If you're arrested, prosecuted and convicted, you can go to jail or prison. But what happens if you're accused of selling steroids … and you *didn't do it*?

My nationwide criminal defense practice caters to the strength and fitness community. I was recently contacted by a top-ranked female bodybuilder in a distant state. We'll call her "Jane." Jane found herself arrested and charged with selling steroids to an "informant" inside the gym she owns. Informants (a.k.a. rats or snitches) have been a longtime weapon in the war against narcotics, and lately used in steroid cases, too. An informant is typically a person who gets busted and, in return for a better deal, agrees to help bust others, such as by making "controlled buys" wearing hidden recording devices. These transactions must be closely monitored to ensure the integrity of the evidence. The axiom among drug police is, "Never trust an informant." If agents do a shoddy job of supervising, the snitch can fool them (deceitfulness is what makes a successful snitch). An informant can steal a portion of the buy money or drugs. Lazy cops can even make it possible for a rogue snitch to frame a totally innocent person.

The abbreviated facts of Jane's case are that the snitch, facing his own drug charges, targeted her to the local drug task force by claiming he'd arranged by phone with her to go to her gym, give her money, and receive a bottle of multivitamins with a hidden vial of testosterone inside. Later that day, the snitch met with the cops. They patted him down for money or drugs and did a quick search of his car. Finding nothing, they gave him the cash, put a wire on him, and let him drive to the gym while they waited nearby. After a lengthy recorded conversation between the snitch and Jane about bodybuilding, he asked for the bottle of multivitamins. She rang up the sale and gave him the bottle. Shortly afterward, he delivered the bottle to the cops and inside was the vial of testosterone. The police viewed it as an open and shut case, as did the prosecutor. Since she had never been in any trouble whatsoever before, the prosecutor offered Jane a "no jail" plea, but if she refused it and lost at trial she'd face over ten years in prison.

Despite the claims, I had a client I believed was 100% innocent. Two "discovery" procedures requiring the prosecutor to disclose certain information pretrial, upon demand, enabled me to prove it. First, I obtained a copy of the audiotape of the transaction. When I listened to it, I understood what the snitch had done. Second, I demanded to interview the snitch before trial. Luckily, this was one of the few jurisdictions permitting this. So, I packed my bag and flew out to the distant Western state to nail this lying rat to the wall.

The critical moment in the transaction occurred after the snitch received the bottle but before he delivered it to the cops. He asked to use the bathroom. And he took the bottle with him. Why couldn't he wait until after he delivered the bottle to the police? After all, the bottle was the key piece of physical evidence in the case. The police directed him to bring it directly and immediately to them, to preserve a clean chain of custody from Jane. Why didn't he come straight to them? "I had to go to the bathroom, really bad!" he exclaimed under my cross-examination. "Number one or number two," I asked. "Number one," he answered. "Wait a minute," I said skeptically, "you had to go so badly, so terribly that you couldn't wait just five minutes?" He took the bait. To justify his unauthorized detour, he droned on and on about the distressing urgency of his problem, and then detailed his glorious relief at emptying his bladder.

But he'd walked into my trap. The wire he had been wearing was still recording in the bathroom. And the sound quality was perfect. When I played the audio the prosecutor's face turned as white as a sheet. There wasn't a "tinkle" to be heard. Not a single drop. Instead, there was only the unmistakable sound of vitamin-sized objects hitting the porcelain as the dirty rat dumped them into the bowl and flushed, making space in the vitamin bottle for him to insert the vial himself and frame Jane. Client exonerated … and case rightfully dismissed!

Why did this snitch frame Jane? Presumably he wanted his sweetheart deal, didn't want to set up any real drug dealers, and figured a national level bodybuilder would be an easy mark. It's pretty scary. Where exactly he hid the vial isn't certain, but half-assed pat-down searches and quickie car checks don't cut it. And the police should never have taken the snitch's word about the original phone call – if it had been recorded, none of this injustice would have happened. Further, neither the cop nor the prosecutor bothered to listen to the tape until I played it for them, and neither had even realized that their informant took a detour to the bathroom.

Framed arrests of totally innocent people are, thankfully, somewhat rare. But we should never forget that they can happen, and all players in the criminal justice system should do their part to avoid them. Steroids are quite different from traditional drugs of abuse, but their legal classification doesn't make that distinction. Anyone involved with the "dark side" of hardcore training should keep that it mind!

Rick Collins, JD, CSCS [*www.rickcollins.com*] is the lawyer that members of the bodybuilding community and nutritional supplement industry turn to when they need legal help or representation. You can reach his office at 516-294-0300.

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BioMed Central

Research article

Open Access

A league of their own: demographics, motivations and patterns of use of 1,955 male adult non-medical anabolic steroid users in the United States

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Abstract

Background: Rule violations among elite-level sports competitors and tragedies among adolescents have largely defined the issue of non-medical anabolic-androgenic steroid (NMAAS) use for the public and policy makers. However, the predominant and oft-ignored segment of the NMAAS community exists in the general population that is neither participating in competitive sports nor adolescent. A clearer profile of NMAAS users within the general population is an initial step in developing a full understanding of NMAAS use and devising appropriate policy and interventions. This survey sought to provide a more comprehensive profile of NMAAS users by accessing a large sample of user respondents from around the United States.

Methods: U.S.-based male NMAAS users (*n* = 1955) were recruited from various Internet websites dedicated to resistance training activities and use of ergogenic substances, mass emails, and print media to participate in a 291-item web-based survey. The Internet was utilized to provide a large and geographically diverse sample with the greatest degree of anonymity to facilitate participation.

Results: The majority of respondents did not initiate AAS use during adolescence and their NMAAS use was not motivated by athletics. The typical user was a Caucasian, highly-educated, gainfully employed professional approximately 30 years of age, who was earning an above-average income, was not active in organized sports, and whose use was motivated by increases in skeletal muscle mass, strength, and physical attractiveness. These findings question commonly held views of the typical NMAAS user and the associated underlying motivations.

Conclusion: The focus on "cheating" athletes and at risk youth has led to ineffective policy as it relates to the predominant group of NMAAS users. Effective policy, prevention or intervention should address the target population(s) and their reasons for use while utilizing their desire for responsible use and education.

Background

As many as 3 million Americans may have used anabolic-androgenic steroids (AAS) for non-medical purposes [1]. However, concerns over non-medical AAS (NMAAS) use have been motivated less by prevalence in the general population than by NMAAS in two specific subpopulations: athletes contravening the rules of elite-level sports [2-5] and minors [6,7]. Such concerns essentially dominated the media and policy debate when AAS control legislation was enacted in 1990 and amended in 2004. In a time marked by global terrorism and potential ecological crises, the President of the United States stated during the 2004 State of the Union address to note that the "...use of performance-enhancing drugs like steroids in baseball, football and other sports is dangerous, and it sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character" [8].

Detailed information on NMAAS and its motivations are difficult to obtain due to the legal implications and the subsequent wariness within the NMAAS subculture [9,10]. Most prevalence estimates of use emerge from larger surveys of drug use among high school and college students [7,11-18] and are fielded periodically in school settings [13,19], surveying large national samples. However, such surveys often collect only limited information on NMAAS use, such as lifetime, past year, and past month use with no data indicating the rate of repeated use of AAS among adolescents. This focus on secondary and collegiate students partly reflects concerns for the profound effects of substance use during adolescence [20] as well as concerns for recent rare and tragic teenage suicides that were possibly associated with mismanaged cessation of NMAAS use [21,22].

In the case of NMAAS use among elite athletes, although highly visible and widely publicized, it is almost certain that the attention garnered exaggerates the contribution to overall prevalence of NMAAS use; such athletes likely comprise only a minor percentage of the NMAAS using population [7,23-25]. In fact, researchers claim that "The large majority of anabolic steroid users are not elite athletes" [8].

Though prevalence rates derived from surveys in educational settings or discussion of elite athlete use provide useful information on use patterns and trends over time in certain populations, they tell us nothing about the characteristics of those who self-administer AAS for non-medical purposes. In fact, despite calls for a more complete characterization of NMAAS users more than 15 years ago [26], questions still remain: Who among the general population are using AAS? Why and how do they use them? When did they begin using them? Most of what is known about the onset and patterns of, and motivations for, NMAAS use has been derived from small, non-representative samples of users [27-29], or case reports [30]. Such small selective samples from limited geographical areas are not likely to accurately characterize the general NMAAS-using population. Therefore, this survey sought to provide a more complete profile of NMAAS users by accessing a large sample of user respondents from around the United States via various Internet websites and magazines dedicated to resistance training activities and use of ergogenic substances. It is hoped that the resulting information on NMAAS use – who, what, why, when and how – would increase understanding of those who self-administer NMAAS and thereby increase understanding relevant to social policy, risk identification, prevention, and treatment.

Methods

Recruitment strategy

The illicit nature of NMAAS use can hamper traditional recruitment efforts. Users often have justifiable concerns about confidentially when responding to questionnaires in person or by mail. Conversely, the resources required to personally interview a large representative sample of participants can be prohibitive. Thus, most large scale surveys focus solely on prevalence and most in-depth studies use either small local samples or select groups (e.g., prisoners or patients in treatment).

To circumvent those concerns, promote participation, and facilitate recruitment, an Internet-based survey tool was designed. The Internet has become the primary means of buying and selling illicit AAS [31] and a primary source of NMAAS information [32]. Most NMAAS users are likely to be experienced with the Internet and its use in NMAAS-related activity. This approach allowed for anonymity and enhanced privacy and confidentiality, and also facilitated access to a wide range of geographical areas. It has previously been used in NMAAS surveys [33,24,32]. Web-based surveys provide a validated method for collecting self-reports of substance use [34-36] and efficient access to large representative samples of specialized groups [37]. Further, their validity has been supported by their consistency with other data collection methods [38,39].

A written request for participation, including a brief explanation of the purpose and scope of the survey, emphasizing participants' privacy and the researchers' objectivity and interest in participants' "candor," "honesty" and "truthfulness", was posted to several venues.

Recruitment methods

1) *Internet posts* – A URL link to the web-based survey was posted on 12 online message boards where steroid discussion is commonplace. The message boards attract a broad

range of individuals to discuss topics such as bodybuilding, strength, fitness, diet, nutritional supplements, sports, and NMAAS use. A link was also placed on an educational site [40] operated by one of the authors (R.C.) These materials are known to have migrated (see # 4 below), from their original sites, although the full extent of migration is unknown.

2) *Mass emails* – Three of the above-referenced message boards sent an email requesting participation to all registered users.

3) *Print media* – A brief description of the survey, including the URL, was printed in a popular bodybuilding magazine (*Muscular Development*, 12/05).

4) *Spontaneous network recruiting* – Participants, on their own (without solicitation), passed information about the survey's existence to others.

The survey was fielded for four months. Only those with Internet access who chose to participate after reading about the study were included. No data is available to compare participants to NMAAS users without Internet access, those unaware of the survey, or those who chose not to participate.

Instrumentation

Clicking the URL opened an informed consent page constructed in accord with the American Psychological Association (APA) Ethical Principles of Psychologists and Code of Conduct [41]. Privacy and confidentiality were insured in several ways: No identifying data were collected. Internet Provider (IP) addresses were not logged, so responses could not be linked to a specific computer. Secure Sockets Layer (SSL) 128 bit encryption and 1024 bit exchange facilitated secure transfer of data. Data were secured in an encrypted, password-protected hidden vault on a dedicated computer. An Internet cookie placed on respondents' machines allowed completion of the survey over multiple sessions if desired and discouraged multiple submissions. Respondents were informed about the cookie and, upon starting and completing the survey, provided instructions deleting it. The survey blocked any respondent who did not consent, indicated they were less than 18 years old, did not use AAS for non-medical purposes, or had previously taken the survey.

The survey included 291 items assessing various domains, including demographic/background data, AAS use patterns and purchasing behavior, positive and negative physiological and psychological side effects, health and mental health history, other drug use, and dietary practices. A subset of the data is presented herein to describe the users of AAS, their motivations, history, methods and practices of use.

Respondents rated the effectiveness while considering side effects of a variety of AAS and other drugs on a 5-point likert-type scale from 1 (very poor) to 5 (very good) in response to the following statement: "After considering side effects, please rate the following in how effective and useful they are in helping you reach your goals". Respondents who had not used an agent that was to be rated were requested to skip that item. The effectiveness of ancillary drugs were rated on 3-point likert-type scale (1 [not effective], 2 [moderately effective], 3 [highly effective]) or a box indicating they had never used the agent. NMAAS use motivations were rated on a 5-point likert-type scale from 1 (not a reason for use) to 5 (very important) in response to the stem "How much do the following items (15) motivate your use?" The survey software randomized the order of presentation. Concerns for aversive effects upon cessation as motivation (negative reinforcement) were assessed via endorsement of the following outcomes should access to AAS be lost or AAS use ceased: "Nothing, this would not be an issue for me", "Losing size/getting small", "Losing strength", "Losing respect", "Being unattractive", "Decreased ability to compete in sports" and "Other" which allowed an open-ended response. Sports involvement at the high school, college, amateur, Olympic and professional levels, as well as occupation and age, were obtained via open-ended questions. Dietary regimen questions were rated on a 5-point likert-type scale.

Past behavior (e.g., age of onset of AAS use, high school athletic activities) was also assessed. Although such queries can be subject to hindsight bias, participants are normally able to reliably provide valid historical information [42] and AAS users especially have "...an uncanny ability..." to recall their AAS use history from as many as 20 years earlier [10].

To enhance motivation and attention, skip logic was employed; participants responded only to personally-relevant items based on prior responses. For this reason, not all participants answered all items and, therefore, the number of responses varied from domain to domain. In addition, not all participants responded to all relevant items (such sporadic missing data is not uncommon in large surveys; [43]). Hence, proportions of participants responding to items of interest are reported. The survey took 30–45 minutes to complete.

Data analysis

SPSS for Windows (version 13) was used for statistical analyses. Descriptive statistics (e.g., means, medians, modes, ranges and standard deviations) are provided where applicable and in certain areas, descriptive compar-

isons are made with U.S. Census data. Medians were reported rather then means when data were skewed. Scale means, based on the 5-point likert-type format noted above are presented in some areas. Pearson's product movement correlations (*r*) evaluated relationships between interval data.

Results

The full sample comprised 2,663 males and females from 81 countries. To control for gender and cultural differences in NMAAS use and national differences in the legal status of AAS, this report focuses only on NMAAS use among American males. The final analysis sample in the current report included 1,955 American males engaged in NMAAS use.

Who is using AAS?

Age and marital status

The average AAS user was 31.1 years of age (*SD* = 9.16; age range = 18 – 76) and the median age was 29 years. An overwhelming majority (88.5%) were Caucasian/White (see Figure 1). About half had never been married (51.38%), although many were currently married (38.38%) and some were divorced (9.09%). Consistent with the largely unwed status of the sample, most did not have children (64.21%).

Education, employment and income

The group was well-educated; most held post-secondary degrees (74.1%) and, compared to recent U.S. Census statistics, more had completed college and advanced degrees and fewer had failed to graduate high school than expected based on the general populace (see Figure 2). Most were employed full-time (77.7%; see Figure 3) and the overall employment rate of 98.5% was higher than for males aged 20 years or more in the U.S. population (72.4% as of November, 2005; [44]). The unemployment rate for males aged 20 years and older in the U.S. in November, 2005 was 4.3% [44], nearly three times the 1.5% unemployment rate observed among this NMAAS-using sample. Most were employed as professionals (i.e., "white collar" employees; see Figure 4) with median household income between $60,000 and $79,999 per year, much higher than the general population ($44,684[45]; see Figure 5). Such above-average educa-

Race/Ethnicity	N	Percent
Caucasian/White	1727	88.5%
Hispanic/Latino	83	4.3%
Multi or Biracial	41	2.1%
Asian	26	1.3%
African-American	25	1.3%
Native American	19	1.0%
Middle Eastern	12	0.6%
Other	11	0.6%
Pacific Islander/Native Hawaiian	7	0.4%

Figure 1
Race/Ethnicity.

Highest Level of Education Obtained to Date	AAS Respondents	*US Census	Percent Difference between AAS Users and US Census
Did not graduate high school	0.9% (n=17)	16.3%	-15.4%
GED	2% (n=39)	x	x
High school diploma	23% (n=448)	31.1%	-8.1%
Vocational school	5.1% (n=100)	3.6%	1.5%
Bachelor degree	33.2% (n=647)	15.6%	17.6%
Master degree	7.6% (n=149)	5.5%	2.1%
Professional degree (e.g., MD, JD)	3.7% (n=72)	1.4%	2.3%
Doctorate	1.5% (n=30)	1.0%	0.5%

*U.S. Census Bureau [http://www.census.gov/prod/2005pubs/p70-98.pdf]
**U.S. Census Bureau statistics from 2001 for American's 18 years and older; includes females
***Several respondents are current college students which would change the number of those with a high school diploma to 18.92% (n=369).
****X= Data not available

Figure 2
Level of Education.

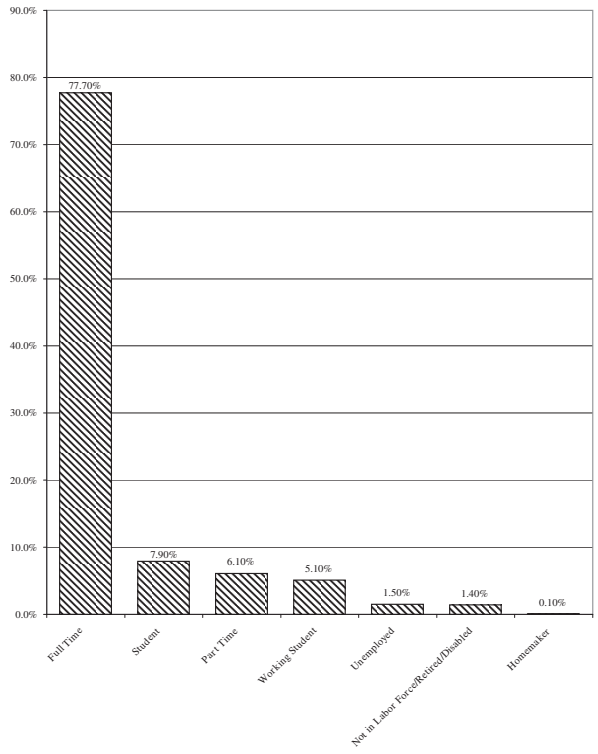

Figure 3
Employment Status.

Occupation	N	Occupation	N
Athlete/Coach	8	Health Care	112
Banking/Finance/Accounting	92	IT/Computer	99
Business Owner/Self Employed	130	Law Enforcement/Fire Fighter/Corrections/Security/Bouncer	77
Customer Service/Service	49	Legal	20
Engineering/Architect	93	Military	30
Entertainment/Art	54	Sales/Marketing	149
Executive/Management	194	Scientist/Education	57
Fitness Industry/Personal Trainer	76	Skilled Labor/Labor	213
*Table does not include all occupations **Respondents who listed a job and student status are not included in these figures			

Figure 4
Occupations.

tional and occupational functioning appear consistently among AAS users (see also [25]).

Users' perceptions

Compared to others, respondents considered their drive and motivation in the "average/above average to above average" range. Most responded as setting "average/high to high" goals and a majority (70.2%) self-identified as "perfectionists". They tended to view "some to some/all" of life as a competition and felt that "half to most (75%)" of daily activities focused on goal achievement.

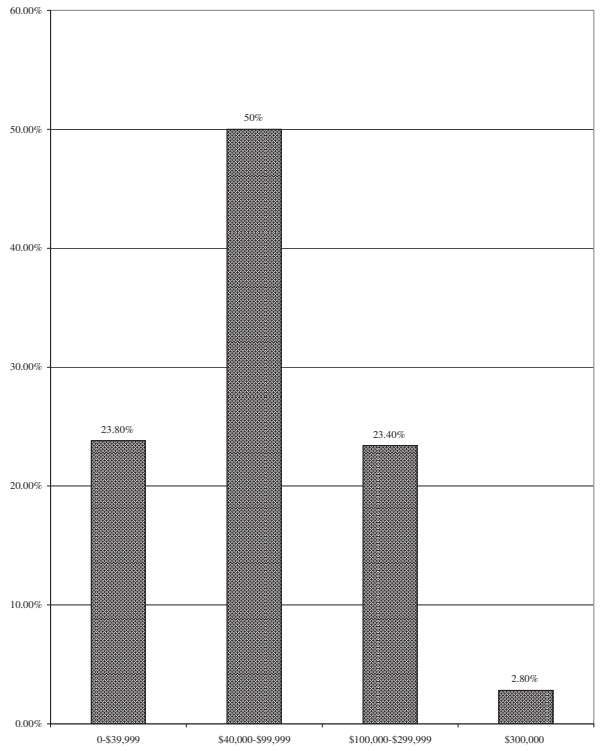

Figure 5
Annual Household Income.

In sum, NMAAS use was associated with a relatively high level of functioning. Users self-identified as being driven and motivated, viewed life competitively, and focused on goal achievement. It must be noted, however, that, although Internet surveys are a validated methodology and 70% of Americans (82% of those between the ages of 18 and 49) use the Internet [46], the possibility that the use of an Internet survey strategy could have lead to an over-sampling of those with higher education and socio-economic status cannot be completely ruled out.

What agents are being used and how are they obtained?

Popularity of various AAS agents

Reports of use and effectiveness ratings while considering side effects were obtained for 15 AAS agents. Single ester testosterones, methandrostenolone, and nandrolone decanoate were the most commonly used agents and single and multi-ester testosterones and trenbolone were

Agent	Prevalence	Rating**
Anadrol (oxymetholone)*	37.7% (n = 753)	3.6
Anavar (oxandrolone)*	37% (n = 724)	3.8
Clenbuterol^	49.5% (n = 967)	3.4
Dianabol (methandrostenolone)*	64.9% (n = 1269)	4
Deca Durabolin (nandrolone decanoate)*	63.5% (n = 1242)	4
Dynabolan (nandrolone undecanoate)*	19.8% (n = 388)	3.3
Equipoise (boldenone undecanoate)*	53.9% (n = 1053)	4
Furzabol*	12.2% (n = 238)	2.6
Halotestin (fluoxymesterone)*	19.4% (n = 380)	3
Human Growth Hormone`	27.9% (n = 545)	4.1
IGF-1`	19.4% (n = 380)	3.8
Masterone (drostanolone)*	20% (n = 391)	3.7
Methyltestosterone*	26.1% (n = 346)	2.7
Primobolan (methenolone)*	28.2% (n = 551)	3.7
Insulin`	21.5% (n = 421)	3.6
Multi Ester Testosterone*	56% (n = 1094)	4.4
Single Ester Testosterone*	78.2% (n = 1529)	4.7
T3/T4^	37% (n = 722)	3.5
Trenbolone*	51.3% (n = 1002)	4.5
Winstrol (stanozolol)*	56% (n = 1094)	3.8
*=AAS		
^=thermogenic agent		
`=peptide		
** rating scale = 1 (very poor), 2(poor), 3 (acceptable), 4 (good), 5 (very good)		

Figure 6
Prevalence and Ratings for Various Agents.

rated most effective/useful (see Figure 6. Average total AAS dosages ranged from <200 mg (n = 59, 3.6%) to more then 5,000 mg/week (n = 2, 0.1%) with an average of 500–1000 mg/week. The highest dosage of testosterone used for four or more weeks had considerable variability with an average dosage of 797.5 mg/week (sd = 540.11, range = <200 to 10,000 mg/week). Typical weekly testosterone and methandrostenolone dosages are listed in Figures 7 and 8 respectively.

NMAAS users also make use of thermogenic agents. These agents are primarily used to reduce body fat with some providing the additional ergogenic benefit of beta-adrenergic stimulation (see Figure 6). NMAAS users have also complemented the ergogenic pharmacopeia to include peptide hormones (e.g., human growth hormone (HGH), insulin-like growth factor (IGF-1), insulin; see Figure 6). Ancillary drugs are also used by NMAAS users to prevent or treat side effects or increase the effectiveness of AAS (see Figure 9).

Methods of obtaining AAS

Consistent with the Internet having become a major source for obtaining AAS, half of our sample (52.7%) had purchased AAS over the Internet. Smaller percentages obtained AAS via local sources (16.7%), friends or training partners (15%), physician's prescription (6.6%), or transporting them from foreign countries (5.8%). Some participants reported using multiple methods for procurement and others (0.92%, n = 18), in keeping with privacy/confidentiality concerns, were reluctant to provide this information.

Why are AAS being used?

Positive motivations/reasons for AAS use

The most highly-rated motivations were increased muscle mass, increased strength and enhanced physical appearance (see Figure 10). Other relevant but less highly-rated factors included increased confidence, decreased fat,

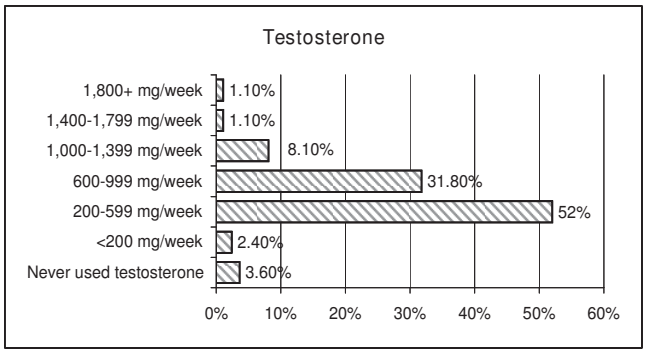

Figure 7
Typical Weekly Testosterone Dosage.

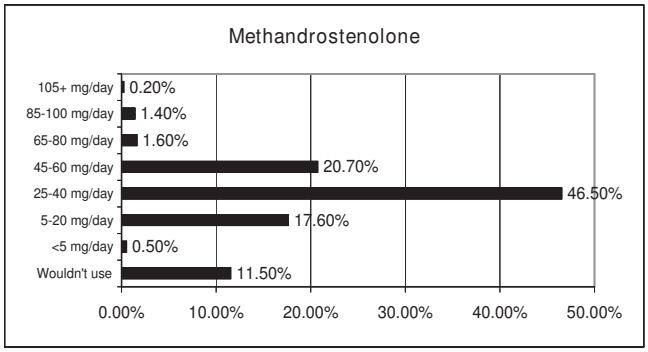

Figure 8
Typical Daily Methandrostenolone Dosage.

improved mood and attraction of sexual partners. Injury prevention, recreational weightlifting, increased endurance, amateur bodybuilding, amateur/recreational sports and power lifting were rarely endorsed motives. AAS' psychotropic effects have been posited as a means whereby AAS dependence might occur [47]; however, virtually all users in our sample (98.8%) denied injecting AAS in order to get "high."

Athletics as a motivator

The literature suggests that NMAAS use is rarely, in a statistical sense, motivated by sports participation. Our data showed this as well; 85.1% and 89.2% of NMAAS users, respectively, reported that professional bodybuilding and professional sports did not motivate their NMAAS use, making these the least motivating factors. Only 6.3% and 5.8% respectively indicated bodybuilding and professional sports were "very important" factors in their desire to use AAS.

Involvement in any sport, including high school, college, amateur, Olympic or professional sports was rare; most were not involved in organized sport (89%) even when non-traditional sports, such as mixed martial arts, and recreational activities, such as amateur baseball, were included (see Figure 11). At the most common level of organized sports, high school athletics, 81.8% of current users had not participated in high school sport [s]. A minority (4.1%) had played a high school sport and used AAS prior to age 18, although data on the concurrence of these behaviors was not available. Although, as with athletics, bodybuilding is often seen as a major motivation for NMAAS, 84.34% had never competed in any bodybuilding contest, while 15.54% competed as amateurs and only 0.10% had competed professionally in bodybuilding.

Ancillary Drug	Prevalence	Mean Rating	Reason for Use
Accutane	7.7% (n = 151)	2.7	Prevent or treat acne
Antidepressants	9.3% (n = 182)	2.1	Mood elevation
Arimidex (anastrozole)	41.1% (n = 804)	2.6	Prevent estrogen side effects via halting the conversion of excess androgens into estrogen
Aromasin (exemestane)	8.1% (n = 160)	2.7	Prevent estrogen side effects via halting the conversion of excess androgens into estrogen
Antianxiety medications	11.2% (n = 219)	2.3	Reduce anxiety
Blood pressure medications	9.7% (n = 190)	2.4	Reduce blood pressure
Clomid (clomiphene citrate)	61.9% (n = 1210)	2.4	Estrogen antagonist used to prevent estrogen related side effects / stimulate FSH to elevate reduced testosterone levels during a cycle
Femara (letrozole)	14.4% (n = 281)	2.7	Prevent estrogen side effects via halting the conversion of excess androgens into estrogen / stimulate FSH to elevate reduced testosterone levels during a cycle
Proscar, Propecia (finasteride)	10.8% (n = 211)	2.1	Alpha reductase inhibitor which blocks the conversion of testosterone into DHT / used to prevent balding
Human Chorionic Gonadrotropin (HCG)	43% (n = 840)	2.6	Reverse or prevent testicular atrophy by acting like LH and stimulating Leydig cells
Nolvadex (tamoxifen citrate)	65.3% (n = 1277)	2.6	Estrogen antagonist used to prevent estrogen related side effects (e.g., gynocomastia) / stimulate FSH to elevate reduced testosterone levels during a cycle
Sleeping medications	22.7% (n = 444)	2.6	Sleep aid
Viagra (sildenafil citrate); Cialis (tadalafil)	27.5% (n = 538)	2.6	Treatment of erectile dysfuntion
* Rating scale = 1 (not effective), 2 (moderatley effective), 3 (highly effective) or a box indicating they had never used the agent			

Figure 9
Ancillary Drugs.

Negative reinforcement/reasons to continue NMAAS

Complementary to the positive reinforcement motivations endorsed, when asked about aversive factors motivating continued use (i.e., concerns over cessation), loss of muscle mass was the most frequent concern (37%), followed by strength loss (27.2%), decreased attractiveness (12.4%), decreased physical ability (7.2%) and loss of respect (6%). Notably, 30.6% considered the possible loss of access to AAS a non-issue.

Effects of age and life stage on motivation for NMAAS

Increasing age within the sample was associated with decreases in several motivations for NMAAS; professional bodybuilding [$r(1707) = -.126$; $p = .001$], attracting sexual partners [$r(1754) = -.105$; $p = .001$], increasing muscle mass [$r(1801) = -.103$; $p = .001$], professional sports [$r(1712) = -.097$; $p = .001$], preventing injury [$r(1738) = -.094$; $p = .001$], recreational weightlifting [$r(1703) = -.090$; $p = .001$], amateur/recreational sports [$r(1714) = -.088$; $p = .001$], increasing strength [$r(1708) = -.078$; $p = .001$], and increasing confidence [$r(1758) = -.061$; $p = .010$]. Conversely, older AAS users were more motivated by decreasing fat [$r(1771) = .124$, $p = .001$]. Most of these changes, such as age-related decreases in a desire for increased muscle, strength, and sexual attraction and increased interest in fat reduction appear to reflect expected shifts in focus based on development. Improving mood, appearance, endurance, power lifting and amateur bodybuilding were not correlated with age.

When are AAS being used?

Age of initial NMAAS and use history

Estimates for 2005 suggested that 2.6% of 12th graders had used AAS in their lifetime, down from a high of 4.0%

Motivation for AAS Use	N	Mean Rating*	SD
Increase muscle mass	1821	4.71	0.6
Increase strength	1797	4.28	0.91
To look good	1798	4.19	1.06
Increase confidence	1775	3.578	1.37
Decrease fat	1790	3.576	1.26
Improve mood	1765	3.23	1.46
Attract sexual partners	1772	3.16	1.51
Prevent injury	1754	2.969	1.45
Recreational weightlifting	1718	2.968	1.41
Increase endurance	1759	2.79	1.47
Amateur bodybuilding	1754	2.27	1.47
Amateur/recreational sports	1729	2.11	1.33
Power lifting	1733	2.01	1.36
Professional bodybuilding	1721	1.6	1.13
Professional sports	1728	1.45	1.06
*Rating scale = 1 (not a reason for use), 2 (of little importance), 3 (somewhat important), 4 (important), 5 (very important)			

Figure 10
Motivation for AAS Use.

in 2002 [19]. This study addresses a slightly different question: What is the average age of initiation and the prevalence of adolescent NMAAS use onset among adults who are currently using AAS? That is, do most adult users initiate NMAAS as adolescents?

The average age of NMAAS use onset was 25.81 years old (*sd* = 8.26), agreeing with other reports of NMAAS use onset in the mid-20s [25,48-51]. The youngest reported age of onset was 14 years (*n* = 1) and the oldest was 68 years (*n* = 1). Initiation of NMAAS use was almost exclusively an adult phenomenon; 94% commenced use at age 18 or older. The average user had used AAS, from onset to the present, for 5.53 (*sd* = 5.92) years, ranging from less than 1 year to 43 years of cycling of NMAAS. Most (61.0%) initiated NMAAS within the first five years of weight training.

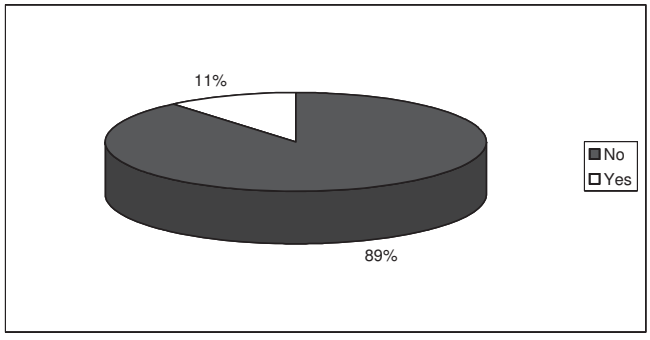

Figure 11
Percent of Respondents who are Current Athletes.

How are AAS being used?

Training experience and practices

Users averaged 11.07 years (SD = 6.21) of weight training and the majority (69.6%) averaged four to five workout days per week. Most maintained a fairly standard training regimen and few (0.90%) trained seven days per week, a level at which some concern might be noted.

Dietary regimen

For a large majority (88.4%), the preponderance (75%) of their daily diet "always" or "frequently" included lean protein consumption and almost half (46.5%) reported consuming "a lot more" than 6 to 10 servings of protein-based foods on a daily basis. Fried food was largely "always" or "frequently" limited (71.3%) and consumed less than once per week (77.6%); three-quarters (76.2%) limited saturated fat intake. Most (73.2%) consumed "a lot less" than one sugar-containing soft drink daily, with many (41%) restricting carbohydrates to "a lot less" or "a little less" than seven servings per week. More than one-quarter (26.4%) reported consuming about 3 to 5 servings of milk daily, with an additional 44.7% consuming "a little" or "a lot more" and 28.9% consuming "a lot" or "a little less". The majority reported consumption of less than 3 to 5 servings of fruit (62%) or vegetables (48.1%) daily.

Cycling of NMAAS

AAS are typically cycled, with periods of use interspersed with periods of recovery/abstinence, to allow the endocrine systems of the body to return to homeostasis. There was considerable variability in cycle length (range of 1 week [n = 1] to 728 weeks [n = 1]), with a median of 11 weeks. Most had administered AAS for a total of 5 of the preceding 12 months; 13.5% had not used AAS during the past year and 5% had used AAS for the entire previous year. The average year included 4 to 6 months of use; however several (16.8%) did not answer or could not provide an estimate due to variability in their cycling history. The modal longest on-cycle period was 12 weeks.

Cycle planning and preparation

Most ("75–100%") AAS needed for a cycle were obtained prior to beginning a cycle by most users (80%). Ninety-six percent planned the length, dosages and compounds prior to beginning a cycle; 2/3 (69.3%) "always" kept to their predetermined plan and an additional 30.6% "frequently" did so. Cycles were altered to increase (18.7%,) or decrease (13%) dosages or to avoid side effects (11%). Finances (3.5%) or an inability to obtain desired AAS (6.5%) were not factors for most. An additional 1.6% indicated that alterations to their cycle stemmed from work and personal life-related issues or injury. Of those (5%) not planning their cycles, most determined their use based on body response and goals.

Injection practices

Injection has been noted as the most common method of self-administration of NMAAS [24,52] and our data showed this as well; a vast majority injected AAS (95%). Sharing of needles or multi-use vials was denied by an overwhelming majority (99%); a finding also consistent with other reviews [53-55]. Reusing of needles was rare (0.7%) and most (73%) used a clean needle to draw the solution into the syringe and a separate needle to inject. Infections resulting from injection were rare (7%).

Injectable AAS were preferred over oral compounds by most (77%), with health reasons and the belief of better results in comparison to oral AAS considered important. To a lesser extent, the ability to maintain a stable blood level was somewhat important, while ease of use, how the AAS made the individual feel, and the inability to obtain injectable AAS were of lesser importance.

Medical supervision of NMAAS

Most (66%) expressed a willingness to seek medical supervision and the preponderance (61%) obtained blood work at least once per year to assess the effects of NMAAS use on their physical health. However, NMAAS users often mistrust physicians and consider them uniformed regarding NMAAS [56]. Accordingly, more than half (58%) lacked sufficient trust in their physician to report their NMAAS use; 92% felt the medical community's knowledge about NMAAS use was lacking. In addition, almost all (99%) felt that the public has an inflamed view of NMAAS side effects.

Discussion

Who is using AAS?

NMAAS is largely an adult phenomenon; the median user was twenty-nine years old, agreeing with earlier reports [25,32]. Users were typically unmarried Caucasians in their 20s and 30s who initiated NMAAS use after reaching the age of majority. They were not active in organized sports. They were highly educated, gainfully employed, white collar workers earning an above average income; such high levels of functioning in terms of education, income, and employment are consistent findings [9,25] and are inconsistent with the popular view of substance abusers. In total, our findings belie the images of AAS users as mostly risk-taking teenagers, cheating athletes, and a group akin to traditional drug abusers.

One possible limitation is our use of the Internet and the potential bias toward a higher-functioning group. However, the similarities of this sample with others employing different methodologies [25,32,53] minimizes this concern. Because the Internet is now a primary source for both purchasing AAS [31] and NMAAS information [32], a wide range of users are likely familiar and comfortable with its use. Hence, our sample likely represents the non-elite athlete, adult NMAAS using population. Further, the use of the Internet controlled for potential geographical variation in NMAAS prevalence and related behaviors [53,57,58]. Finally, the Internet facilitated access to a large sample – the largest, to our knowledge, ever collected.

NMAAS use was rarely associated with athletics; most users did not compete in sports of any kind. In fact, relatively few had participated in high school sport and few reported using AAS at that time in their life. Contrary to portrayals of coaches and athletes as the primary consumers of AAS, only eight respondents were athletes or coaches by occupation; the results in this large sample agreed with those using smaller samples [25,32,52,59]; recreational weightlifters comprised almost 90% of our sample, also similar to reports from other reviewers [24]. NMAAS may, indeed, be prevalent among elite athletes, but competitive athletes are few among NMAAS users. Cheating in sport is a rare motivation for NMAAS and the small number of professional athletes using AAS generally competed in power sport events (e.g., power lifting, wrestling, football, full contact fighting). Interestingly, NMAAS was also reported in unexpected professional sports, such as rodeo, dance and tennis.

Bias must also be considered as a possible cause for low prevalence of athletes in our sample. The extent to which athletes use the Internet, both in general and as a source for AAS or for NMAAS information or read bodybuilding magazines is unknown. Competitive athletes may be less likely to volunteer to participate and provide such sensitive information. Conversely, as noted previously, the observed consistency between our findings and those from smaller datasets [59] suggests we have tapped the same population and we would expect that with the Internet serving as the primary source of AAS trade, athletes should be represented.

The largest yet least visible group of NMAAS users is recreational weightlifters with more varied reasons for use than competitive athletics [51,60]; "...a great deal of anabolic steroid use occurs in private gymnasia (non-local authority) among non-competitive recreational athletes [51]" and "...noncompetitive recreational users make up a large portion of the AAS-using population [25]." Our findings agree with this ubiquitous observation[10,25,32,51,58, 60].

What is being used?

Injectable AAS were most popular and preferred, due largely to decreased liver toxicity as compared to oral agents. Almost 10% exclusively injected AAS, having never used oral agents. Contrary to traditional notions that injection reflects escalation in drug use, intra-muscu-

lar (IM) injection of AAS avoids several of the more serious potential side effects of NMAAS and may be a less risky approach. Oral AAS are associated with liver damage [59,61] and IM injection of AAS "...could therefore be considered a rational attempt to reduce harm rather than an element of escalating use [9]" and may be "...more advisable... [62]." The prevalence and preference of injecting AAS suggests that injection should be considered the normative route of administration; a positive finding, in a public health sense, due to its potential reduction of harm.

Despite having reduced hepatotoxicity, intramuscular injection is not without potential complications; a small minority reported injection-site infection. Still, unlike other groups of illicit drug users [63-65], sharing of needles and multi-use vials, and reuse of needles were almost non-existent. The use of separate needles to draw and inject oil-based products was the standard approach. NMAAS users in general seemed to practice safe injection techniques [51,66] and NMAAS use apparently "...present [s] little risk of HIV transmission" [66] or other blood borne pathogens [53]. Accordingly, viral hepatitis and HIV infection were not reported by anyone in our sample.

Why are AAS being used?

Sports and competitive bodybuilding did not motivate NMAAS use in this group. Amateur sports, bodybuilding and power lifting were rarely cited as motivators. Consistent with this, few acknowledged a fear of losing athletic abilities if they ceased AAS use.

The primary motivations for NMAAS were increased muscle mass, strength and physical attractiveness. Loss of muscle and strength were important concerns should access to NMAAS cease. Negative reinforcement (avoidance motivation) was not as important as positive reinforcement (anticipated gains) in NMAAS; positive effects were endorsed more frequently and highly than were concerns about avoiding negative effects upon cessation. Overall, cessation of AAS use was not a concern for many users. Although low self-esteem certainly may motivate some AAS users, it was not a primary motivator. In fact, loss of respect was the least endorsed fear. The most parsimonious explanation seems to be that NMAAS respondents, like most people, have an idea of how they wish to appear and, as a goal-directed group, adopted a structured NMAAS regimen, along with diet, exercise and other supportive components to attain a desired physique or outcome.

NMAAS appeared to be more associated with an image of the ideal (attractive) body structure and ability as large, muscular and powerful, a view that is consistent with Western ideals, and not with an aversion towards being small. Positive changes in strength and muscularity were more highly endorsed than were avoidance of loss of these characteristics. This is a subtle but important distinction; it suggests a desire to enhance one's physique, even when it leads to use of NMAAS, as motivation, as opposed to body dissatisfaction as psychopathology which leads to AAS use [67]. It is clear, however, that we did not measure satisfaction or dissatisfaction with current physique on our sample. Nonetheless, it has been noted that "...people actively use body image to achieve certain ends, justify particular actions and manage particular identities [68]" and AAS-using and non-using gym goers have comparable concerns about body image [69]. Hence, in goal-oriented NMAAS users, the desire for an improved physique may not reflect dissatisfaction with one's current physique but part of a strategy aimed at self-improvement and achieving their goals. Interestingly, even though increases in body esteem associated with NMAAS allegedly remitted after cessation of use [70], becoming less attractive upon cessation did not concern this group.

The top three motivators among this sample replicated those in two Australian surveys [i.e., [25,71]]. Wright and colleagues (2001) [62] also found increased muscle mass as the primary motivating factor. The use of AAS for fitness-related and cosmetic purposes is widely reported [7,8,24,47,71-74] and NMAAS use has been discussed as a form of appearance enhancement similar to plastic surgery [75]. Our data adds to a literature that suggests that users may consider NMAAS use as a means to enhance normal functioning, which is a growing trend in our society [76].

Motivations for use were generally stable across age groups, consistent with the observation by Brower, Elipulos, Blow, Catlin, & Beresford [27], (1990) that "...older and younger subjects did not appear to differ." It might have been expected that motivations for use would change with development, given the changing nature of roles across the lifespan. The minor differences that did appear primarily were associated with typical age-related biological changes (e.g., motivations for increasing endurance, decreasing fat); however, they may also reflect psychosocial development (e.g., attracting sexual partners, increases in confidence). In any case, although statistically significant, the magnitude of these age-related changes was less than might be expected.

It has been suggested [77] that many AAS users experience a "high" from use, although others [78] found such reports to be rare. Our results agree with the latter notion; the great preponderance of our respondents (99%) denied that immediate psychogenic effects (e.g., intoxication, arousal or euphoria) motivated their use, dose, duration or frequency of use, suggesting that they did not

experience AAS as euphorigenic [6,72] and did not inject for a "high."

When are AAS being used?

Initiation of NMAAS use was an adult phenomenon; onset occurred in the great majority (94%) after reaching eighteen years of age and only 6% of current users initiated NMAAS prior to that age. Reports of age of onset in the literature vary; our results agree with some reports [21] but not others [79]. It appears, however, that the typical adult male American using AAS initiated NMAAS in his mid-twenties [see also [24,25]], within 5 years of beginning weight training. This does not minimize concerns about adolescent NMAAS; significant numbers of adolescents are experimenting with AAS (although surveys suggest that many more experiment with and use other drugs). But adolescent onset of use was rare among ongoing adult users, suggesting a discontinuity between adult NMAAS and adolescent experimentation. Adolescent experimentation may be qualitatively different than adult use, given the developmental issues involved in adolescent drug use/experimentation, and may not invariably lead to longer-term use. Of course, the best data to explore this issue would come from true longitudinal studies as opposed to retrospective reports of onset. Nonetheless, given the potential negative effects of adolescent use, research efforts should focus on exploring adolescents' patterns of and motivations for NMAAS to more fully inform identification of those at risk and efforts to prevent use.

Ultimately, in the absence of longitudinal studies [80], it is impossible to make definitive statements about the relationship between patterns of initiation and long-term use. It is noteworthy that the prevalence of adult onset we observed differs from the pattern of initiation seen in other drugs [e.g., alcohol; [81]] where early onset predicts later use. However, research has shown clear distinction between AAS users and those using other generally illicit drugs [82].

How are AAS being used?

The overall fitness and lifestyle context in which NMAAS is embedded is likely inconsistent with widespread use; as Korkia [58] (1994) noted, few "...are prepared to take regular and vigorous exercise like weight-training, which must accompany AS use, and therefore it is unlikely that AS use would reach epidemic proportions." This is the context of NMAAS; the majority of users maintained a strenuous regular training regimen, lifting weights 4–5 days per week, as well as a strict dietary regimen high in protein and low in fats and sugars.

AAS were used about six months per year, broken up into 3 month periods, reflecting common cycling practices employed to allow the body to return to homeostasis. Periods of use were largely planned in great detail and the necessary drugs were most often in hand ahead of time. Ancillary drugs – drugs used to prevent or treat AAS related side effects or make AAS more effective – were relatively commonplace. NMAAS users utilize SERMs (i.e., clomid [clomiphene citrate], nolvadex [tamoxifen citrate] which block estrogen receptors) or aromatase inhibitors (i.e., arimidex [anastrozole] which block the conversion of AAS into estrogen) because in an attempt to maintain homeostasis, the body converts excess androgens into estrogen, resulting in unwanted side effects. The use of peptides (i.e., HGH, IGF-1, insulin) has received little attention in the realm of NMAAS users; however the availability of recumbent forms of peptides has lead to greater use of these hormones by non-athletes [83]. HGH, although taken with AAS, is often combined with insulin or thyroid hormones (t3/t4). Insulin, familiar to many only as a medication used in the treatment of diabetes, is a very anabolic compound that shuttles needed nutrients to muscles, produces growth factors when combined with HGH in the liver and combats insulin resistance produced by HGH. Thyroid hormones burn fat and NMAAS users may combine them with HGH to increase their levels which is reduced by HGH.

This data raises two interesting points. First, NMAAS involves more forethought and organization than other illicit drug use; it is less impulsive and more considered. The planned cycling, healthy diet, ancillary drugs, blood work, and mitigation of harm via route of administration suggest a strategic approach meant to maximize benefits and minimize harm. Second, pre-planning required users to obtain most of their planned cycle prior to beginning. Hence, unlike other illicit drugs procured by end-users in single or short-term use quantities, AAS users are likely to have substantial amounts of AAS on hand for long-term personal use. To achieve supraphysiological levels of steroid hormones, many respondents used up to 12 methandrostenolone tablets (5 mg each) per day, with a few using over 20 tablets. This reasonably necessitates an initial possession of 1,000 tablets or more for personal use (consistent with anecdotal observations of AAS purchasing patterns; [84]). Such quantities, in the case of single-use illicit drugs, would suggest intent to distribute; in NMAAS they are more likely an on-hand quantity for personal use. The legal implications of this are that some AAS users may be improperly accused of trafficking based solely upon the quantity recovered.

AAS users are well known for being educated on the drugs they use and most seek information about AAS at least monthly [25]. Most recognized the value of medical supervision and regular blood work, but did not trust their physician enough to inform them of their NMAAS.

Consistent with other studies [56,69], they almost universally lacked confidence in physicians knowledge of AAS; a sentiment with which physicians seem to agree [60]. As a result, NMAAS users seek information from various non-medical sources [62].

Conclusion

The picture of NMAAS use reported herein confirms and extends much of what previous research has shown about this subject. It differs from the common impression held by the media and public. High-functioning NMAAS users of approximately 30 years of age who do not compete athletically receive little attention in the larger discussion of NMAAS use and also bear little resemblance to the illicit drug abuser to whom they are often compared. These findings suggest that one size does not fit all.

These results suggest that most attempts to address NMAAS use have been off-target. NMAAS use emerged from the community of elite athletes, but it spread to non-athletes, where it is now more prevalent. The targeting of athletes through drug testing and other interventions does little to address use among non-competitive users. Additionally, condemnations of NMAAS use based on misuse by adolescents, even when it is purportedly associated with tragic deaths, do little to address use among the vast majority of users; they are not adolescents.

Attempts to devalue the accomplishments of sports figures accused of NMAAS are fraught with unintended consequences; communicating social and moral admonishment of "cheating" as a means to curtail use also highlights what may be seen as otherwise unattainable achievements, thus perhaps perpetuating use. We found NMAAS users to be a driven and ambitious group dedicated to gym attendance, diet, occupational and educational attainment. They view AAS as a form of enhancement that, when approached in an informed fashion is seen to have an acceptable cost/benefit ratio. They do not simply self-administer AAS and expect positive effects or achieve goals; most use AAS in conjunction with considerable effort, including strict diet and workout regimens. The vast bulk of AAS users are not athletes and hence, are not likely to view themselves as cheaters, but rather as individuals using directed drug technology as one part of a strategy for physical self-improvement. In fact, this perception parallels current social trends; the use of medications and medical technology for enhancement is a growing phenomenon in our society [76].

A seeming contradiction runs through our data. In spite of possible limitations of the Internet for data collection, the segment of the population engaged in NMAAS that we accessed was an active, young, well-educated, and health-focused group. This health-centered lifestyle may seem clearly inconsistent with the potential complications of NMAAS. However, at least in the case of this sample, the use of AAS appeared well-considered; most attempt to use AAS *responsibly*, adopting what are perceived as safer routes of administration and hygienic injection practices, consuming a healthy diet, employing methods to reduce side effects, obtaining regular blood work, and periodically cycling on and off AAS.

Obviously none of this justifies NMAAS. But prevalence rates of NMAAS are at best stable, if not increasing, in spite of prevention programs, augmented law enforcement attention, increased legal penalties, state-mandated high school steroid testing programs, and various stricter sanctions by professional and amateur sports organizations. This disparity between levels of use and efforts to curtail it may largely reflect the virtually invisible nature of the largest segment of the AAS-using population: adult non-athletes. In contrast to current policies, several have called for harm reduction [60,62]. We, along with our colleagues [62], believe that if a harm reduction policy has merit, it must begin by regaining NMAAS users' trust. That process starts with looking beyond the conventional portrait of NMAAS to further explore how and why these drugs are used in the vast majority of users.

Abbreviations

AAS – anabolic-androgenic steroid(s)

FSH – Follicle Stimulating Hormone

LH – Luteinizing Hormone

NMAAS – non-medical anabolic-androgenic steroid(s)

SERM – Selective Estrogen Receptor Modulator

Competing interests

The author(s) declare that they have no competing interests.

Authors' contributions

JC made contributions to the design, acquisition of data, analysis and interpretation of data and involved in drafting the manuscript and revising.

RC made contributions to the design, acquisition of data, analysis and interpretation of data and involved in drafting the manuscript and revising.

JD made contributions to the design, acquisition of data, analysis and interpretation of data and involved in drafting the manuscript and revising.

DG made contributions to the design, acquisition of data, analysis and interpretation of data and involved in drafting the manuscript and revising.

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The War on Anabolic Steroids

An Examination of U.S. Legislative and Enforcement Efforts

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Introduction

In September 2015, the United States Drug Enforcement Administration (DEA) announced "Operation Cyber Juice" – a "nationwide series of enforcement actions targeting every level of the global underground trade of anabolic steroids and other performance-enhancing drugs, the vast majority of which are manufactured and trafficked from underground labs in China."[1] The operation was "comprised of over 30 different U.S. investigations in 20 states and resulted in the arrest of over 90 individuals, the seizure of 16 underground steroid labs, approximately 134,000 steroid dosage units, 636 kilograms of raw steroid powder, 8,200 liters of raw steroid injectable liquid, and over $2 million in U.S. currency and assets. In addition, DEA and its partners assisted in foreign steroid investigations in four countries coordinated by Europol. Domestic law enforcement partners include the Department of Homeland Security and the U.S. Postal Inspection Service." With additional prosecutions and seizures typically flowing from such operations when defendants enter agreements to cooperate against uncharged co-conspirators, Operation Cyber Juice was a tremendous success by Government standards.

Operation Cyber Juice followed other large-scale DEA-led actions such as Operation Raw Deal[2] (2007) and Operation Gear Grinder[3] before it (2005), along with many smaller government enforcement actions targeting the illegal anabolic steroid trade. Countless steroid border seizures have occurred annually. In just one year, 2000, U.S. Customs agents made 8,724 such seizures, up 46 percent from 1999 and up eight-fold from 1994.[4] In January 2001, federal law enforcement officials announced that they seized more than 3.25 million anabolic steroid tablets in the single-largest steroid seizure in U.S. history.[5]

The "war" on steroids started nearly 30 years ago. Today, with a renewed emphasis on law and order under the U.S. Department of Justice led by U.S. Attorney General Jeff Sessions, the general war on drugs philosophy has been reinvigorated[6] despite condemnation from critics.[7] With both large-scale and small-scale anabolic steroid government enforcement actions likely to continue, it's worth taking a moment to examine the underlying rationale. How did anabolic steroids become targets of the overall drug war, and what was the Congressional intent behind the various federal laws targeting the illicit anabolic steroid trade? Arrests and seizures may grab media headlines, but have anti-steroid enforcement operations brought us closer to the Congressional goals of the federal law which authorizes them? These questions are ripe for exploration.

The Anabolic Steroid Control Act of 1990

In the mid-1980s, media reports of the increasing use of anabolic steroids in organized sports, including a purported hidden epidemic of high school steroid use, came to the attention of the U.S. Congress. Legally, at that time, anabolic steroids were classified as prescription medicines. They were regulated by the Food and Drug Administration (FDA) under the Food, Drug and Cosmetic Act.[8] They could only be prescribed by licensed physicians and dispensed by pharmacists. Their performance-enhancing use in competitive sports had already been identified and denounced. The International Olympic Committee had banned them since 1975. Concerns within the National Football League (NFL) had prompted then-Commissioner Pete Rozelle, in November of 1983, to issue a letter to every player warning about the dangers of steroid use and threatening disciplinary action for players caught using them without a legitimate medical basis. Still, there was a growing perception that sports bodies weren't doing enough to police themselves, with the sports media fanning the flames wherever possible, reporting escalating use and deadly effects.

Pressure was building for government intervention, and Capitol Hill was responding. Members of subcommittees in both the House and Senate made speeches, drafted bills and scheduled hearings to tackle the issue. For example, on February 18, 1987, Rep. Dan Lungren of California addressed the House concerning steroids in sports, ending with "Why do we not act to save the players who are using this stuff right now? But more importantly, why do we not act to save our children?"[9] Lungren went on to advocate criminalizing methandrostenolone (a.k.a. Dianabol) – one particular anabolic steroid out of dozens available — because "our institutions, among them including the NFL, have not taken a serious enough approach to [steroids] and have left the idea that somehow this is a secret medicine that people can use to build themselves stronger and stronger."[10]

On September 22, 1988, Rep. William Hughes of New Jersey proposed making illegal distribution of anabolic steroids a felony. After extensive amendments, including those from Sen. Joe Biden of Delaware pushing from tougher sanctions, the bill emerged from Congress as part of "The Anti-Drug Abuse Act of 1988, which President Reagan signed.[11] The new law, 21 U.S.C. 333(e)(1), punished traffickers of anabolic steroids for non-medical (athletic) reasons with up to three years in prison (up to six years if sold to minors under 18 years), enabling enforcement against those illegally distributing steroids, like shady doctors or overly friendly pharmacists, and against black market dealers. It also provided for application of federal forfeiture laws. Significantly, it permitted the prosecution of dealers and distributors *without* authorizing the arrest or prosecution of personal *users* of anabolic steroids, and it did *not* classify steroids as controlled substances. A different bill, H.R. 995, proposed to create an "Anabolic Steroid Restriction Act of 1989" to criminalize using the mail to transport or sell steroids.

Then, on September 24, 1988, at the Olympic Games in Seoul, Canadian sprinter Ben Johnson ran the 100 meters in 9.79 seconds and became the fastest human ever. The media frenzy that surrounded his subsequent positive test for anabolic steroids did not go unnoticed by Congress.[12] Between 1988 and 1990, Congressional hearings were held to determine whether an even more aggressive law was required – namely, whether the Controlled Substances Act should be expanded to include anabolic steroids.[13] Medical professionals and representatives of regulatory agencies (including the FDA, the DEA and the National Institute on Drug Abuse) testified *against* the proposed amendment to the law. Even the American Medical Association opposed it, maintaining there wasn't enough evidence that steroid abuse leads to the physical or psychological dependence required for scheduling under the Controlled Substances Act.[14] What motivated Congress to ignore the advice of the experts and forge ahead with scheduling?

One issue was the classic "diversion" problem – the lack of accountability by pharmaceutical manufacturers over their production volumes and the absence of a "paper trail" of records among prescribers and dispensers. Controlled substance status addresses the diversion problem by a triplicate "paper trail" and jurisdiction by the DEA. Every person who manufactures, distributes, or dispenses a controlled substance is required to register annually with the Attorney General.[15] It was thought that the tight record-keeping and reporting requirements associated with controlled substance status would prevent pharmaceutical companies from manufacturing more product than could be legitimately used for FDA-approved purposes, and would bar physicians and pharmacists from letting the drug slip into the hands of non-medical users.

Another issue was concern over the unfair advantage that steroid-enhanced professional and top-level athletes have over those who do not use steroids. Words like "unequal playing field," "cheating" and "unfair advantage" were repeatedly used throughout the proceedings by witnesses and legislators alike. Amid the international media circus when Ben Johnson was stripped of his gold medal, elite athletics suddenly seemed less about discipline, training, innate gifts and sportsmanship, and more about who had the better drugs. "Fairness" on the athletic field became front-page news, and the "purity" and ethics of athletic competition became a joke on late night television. The popularity of Olympic competition appeared to be in jeopardy, and both the politicians and the athletic bodies feared that the spillover could ruin all of sports. At one

point, Senator Biden gave voice to what Congress seemed to be really afraid of: "…I think you are going to see, over the next several years some real backlash from the public about sports in America, from Olympians straight through to college sports, to pro sports. There is a feeling of resentment that is growing, and I do not know how it will manifest itself." Empty seats? Lost profits? International embarrassment? The sports world just couldn't afford another Ben Johnson, and certain members of Congress were determined to find a way to prevent it from happening.

Accordingly, the majority of witnesses at the hearings were not the physicians, pharmacologists or addiction specialists to be expected in an inquiry into abuse and dependency. Instead, they were athletes, coaches, trainers and sports officials, mostly from professional and college football. That's why seemingly endless time was devoted to examining the minutest details of the NFL drug testing procedures and technology. It was about whether Congress needed to act to ensure fairness in sports, and about the message that steroid use in elite and professional sports sends to our youth. This consideration surfaced repeatedly, expressed by numerous witnesses and legislators alike throughout the hearings. The focus of Sen. Biden in his opening remarks was on the "stars on the athletic field as the role models in our schools, in our colleges, and in our lives." Sen. Herbert Kohl, owner of the Milwaukee Bucks basketball team, also emphasized, "But worst of all, steroid users set an intolerable example for our nation's youth. Every time a sports hero betrays us through drug use, he or she also harms our children." While concern was occasionally expressed about the actual effects on teens who use steroids, more talk was directed to the demoralizing effect that steroid use by elite sports stars would have on impressionable teens.

When the Subcommittee on Crime of the House Committee on the Judiciary held their final steroid hearing in May of 1990, they were armed with a bill: H.R. 4658, the proposed "Anabolic Steroids Control Act of 1990." Only one witness was called: Congressman Mel Levine of California, whose pitch was that it was "time to take strong measures against anabolic steroid use. Steroid abuse may be the quiet side of the drug war, but it is an extremely serious side of it." The bill added steroids to the Controlled Substances Act by inserting them into 21 U.S.C. § 802, effectively making simple possession punishable by up to one year in prison, distribution and possession with intent to distribute punishable by up to five years in prison, and distribution and possession with intent to distribute to an individual under 21 years of age punishable by up to ten years in prison for a first offense and up to 30 years for a second. It also proposed to amend 21 U.S.C. § 844 with a subsection (b), which would have criminalized coaches, managers, trainers or other advisers who endeavor "to persuade or induce" individuals to possess or use steroids. (For all the attention to cheating athletes, this section somehow never made it to the final law.) Finally, the bill inserted a different performance-enhancing drug, human growth hormone (HGH), into 21 U.S.C. § 333, the so-called Steroid Trafficking Act, replacing anabolic steroids (this made it illegal to distribute HGH for other than medically authorized reasons, but did not make it illegal to possess HGH under the Controlled Substances Act).

The bill passed, and on November 29, 1990, President George H. W. Bush signed the Anabolic Steroid Control Act of 1990[16], which added anabolic steroids to the federal schedule of controlled substances (many individual states followed suit[17]) and criminalized their possession for non-medical purposes, such as by those seeking muscle growth for athletic or cosmetic enhancement. The law became effective on February 27, 1991, and placed 27 anabolic steroids under DEA jurisdiction and in the same legal class (Schedule III) as barbiturates, ketamine and LSD precursors.[18] The term "anabolic steroids" was defined as "any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, and includes - (i) boldenone, (ii) chlorotestosterone, (iii) clostebol, (iv) dehydrochlormethyltestosterone, (v) dihydrotestosterone, (vi) drostanolone, (vii) ethylestrenol, (viii) fluoxymesterone, (ix) formebulone, (x) mesterolone, (xi) methandienone, (xii) methandranone, (xiii) methandriol, (xiv) methandrostenolone, (xv) methenolone, (xvi) methyltestosterone, (xvii) mibolerone, (xviii) nandrolone, (xix) norethandrolone, (xx) oxandrolone, (xxi) oxymesterone, (xxii) oxymetholone, (xxiii) stanolone,

(xxiv) stanozolol, (xxv) testolactone, (xxvi) testosterone, (xxvii) trenbolone, and (xxviii) any salt, ester, or isomer of a drug or substance described or listed in this paragraph, if that salt, ester, or isomer promotes muscle growth."[19]

Under the law, it became unlawful for any person knowingly or intentionally to possess an anabolic steroid unless it was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice (or except as otherwise authorized). A simple possession conviction became punishable by a term of imprisonment of up to one year and/or a minimum fine of $1,000, with higher penalties for repeat drug offenders.[20] Distributing anabolic steroids, or possessing them with intent to distribute, became a federal felony under the 1990 law.[21] An individual who distributed or dispensed steroids, or possessed with intent to distribute or dispense, was punishable by up to five years in prison (with at least two additional years of supervised release) and/or a $250,000 fine, with higher penalties for repeat offenders.[22]

The Anabolic Steroid Control Act of 2004 and the Ryan Haight Act

In February 2004, then-Attorney General John Ashcroft announced the steroid-related indictment of four men in San Francisco.[23] The investigation of a company known as BALCO (Bay Area Lab Co-Operative) led to one of the most notorious doping scandals in American history[24] and made "the Cream" and "the Clear" part of national sports discourse.[25] It prompted President George W. Bush to dedicate part of his 2004 State of the Union Address to a denunciation of anabolic steroids in sports.[26] It also fueled a new round of Congressional hearings, this time focused not on professional football but on Major League Baseball, as well as on the emergence of the over-the-counter "prohormone" market of steroid compounds sold as dietary supplements. Some of these "loop holed" compounds, such as "andro" (androstenedione), escaped controlled substance status because they were apparently unknown to Congress at the time the 1990 law was drafted. Others were specifically brought to market or even designed and then marketed because they did not fall within the limited scope of the 1990 law.

In addition to providing sports journalists with endless opportunities for sermonizing, the BALCO scandal spurred the passage of new federal anti-steroid legislation, which was signed into law on October 22, 2004, and took effect ninety days later.[27] The Anabolic Steroid Control Act of 2004 continued to criminalize the sale or possession of anabolic steroids, but simplified the requisite elements of an anabolic steroid, expanded the list of classified steroidal substances, and corrected some of the draftsmanship problems of the 1990 law. Among the 36 new compounds were androstanediol; androstanedione; androstenediol; androstenedione; bolasterone; calusterone; *1-dihydrotestosterone (a.k.a. "1-testosterone"); furazabol; 13b-ethyl-17a-hydroxygon-4-en-3-one; 4-hydroxytestosterone; 4-hydroxy-19-nortestosterone; mestanolone; 17a-methyl-3b,17b-dihydroxy-5a-androstane; 17a-methyl-3a,17b-dihydroxy-5a-androstane; 17a-methyl-3b,17b-dihydroxyandrost-4-ene; 17a-methyl-4-hydroxynandrolone; methyldienolone; methyltrienolone; 17a-methyl-*1-dihydrotestosterone (a.k.a. "17-a-methyl-1-testosterone"); norandrostenediol; norandrostenedione; norbolethone; norclostebol; normethandrolone; stenbolone; and tetrahydrogestrinone ("the Clear"). Many of these new substances had been marketed as dietary supplements, while others were old pharmaceutical steroids that were missed in the original federal law. The law also directed the U.S. Sentencing Commission to consider amending the federal guidelines to increase the penalties for steroid offenses "in a manner that reflects the seriousness of such offenses and the need to deter anabolic steroid trafficking and use…"[28]

Four years later, Congress passed HR 6353 (S 980), the Ryan Haight Online Pharmacy Consumer Protection Act of 2008, to place strict controls on Internet pharmacies.[29] Named for Ryan Haight, who died at 18 of a drug overdose in 2001 after he obtained Vicodin – not anabolic steroids – over the Internet, the bill was signed by President Bush on October 15, 2008, and became Public Law 110-425. While focused on rogue pharmacies dispensing controlled substances by means of the Internet, the Act had broader implications for anabolic steroid

trafficking cases by increasing the maximum prison sentence from 5 years to 10 years (up to 15 years if use of the drug causes death or serious bodily injury). For those with a prior drug conviction, the maximum prison exposure increases from 10 to 20 years (up to 30 years if use of the drug causes death or serious bodily injury).

The Revision of the U.S. Sentencing Guidelines

In federal criminal cases, the United States Sentencing Guidelines advise courts as to issues of punishment.[30] In controlled substances cases, the volume or quantity of drugs determines the base "offense level."[31] A Sentencing Table sets forth the potential range of months of imprisonment, as determined by applying the offense level on one axis to the past criminal conduct of the accused on the other axis of the table. Congress designated steroids as Schedule III controlled substances, which are generally quantified in a manner such that one "unit" of a Schedule III drug is defined as one pill, capsule or, tablet, and one unit of a substance which is in liquid form means one-half (0.5) ml.[32] However, in creating the original guidelines for anabolic steroids in 1991, the U.S. Sentencing Commission acknowledged distinctions between anabolic steroids and other Schedule III drugs, providing a so-called "steroid discount" in which one unit was uniquely defined as a 10 cc vial of injectable steroids or fifty oral tablets.[33]

Pursuant to the directive in the Anabolic Steroid Control Act of 2004, the U.S. Sentencing Commission initiated an inquiry into the anabolic steroid sentencing guidelines. The Department of Justice urged the Commission to recalculate steroids to be treated just like any other Schedule III drug.[34] Defense lawyers urged otherwise, citing differences between the patterns and characteristics of steroid use as compared to other Schedule III drugs.[35]

On April 5, 2006, the U.S. Sentencing Commission voted to promulgate as permanent "emergency" amendments to the federal anabolic steroid sentencing guidelines which had taken effect the previous month.[36] Under the amendments, injectable and oral steroids became quantified for punishment in a 1:1 ratio to other Schedule III drugs, resulting in a *twenty-fold* measurement increase for injectable steroid units and a *fifty-fold* increase for oral steroid units. One "unit" of an oral steroid became one pill, tablet or capsule. One unit of a liquid steroid became 0.5ml. Steroids in other forms ("e.g., patch, topical cream, aerosol") were to be reasonably estimated based on a consideration of 25mg as one unit. Additionally, sentencing enhancements were created to apply in cases involving distribution to "athletes" or where coaches use their positions to influence athletes to use steroids, as well as in cases involving "masking agents." The new 1:1 ratio ignored any differences between steroid usage and volume patterns as compared to other Schedule III drugs. By providing for tougher punishments, the new guidelines incentivized the DEA, other law enforcement agencies, and U.S. Attorney's Offices to expend resources on anabolic steroid investigations and prosecutions.

The Designer Anabolic Steroid Control Act of 2014

Despite the 2004 amendment to the Anabolic Steroid Control Act, the prohormone market continued. The 2004 law, like its predecessor, failed to close the loophole, once again giving creative chemists the opportunity to avoid the reach of the law.[37] On September 29, 2009, the Subcommittee on Crime and Drugs of the Senate Judiciary Committee once again convened regarding steroids, this time in a hearing on "Body Building Products and Hidden Steroids: Enforcement Barriers."[38] It was conceded that in the years since the 2004 law was enacted, DEA had taken steps to administratively schedule only three substances and was reviewing three others. It was clear that the existing law was still inadequate to deal with the proliferation of loop holed designer steroids on the dietary supplement market.

On December 18, 2014, President Barack Obama signed the Designer Anabolic Steroid Control Act of 2014 ("DASCA").[39] DASCA cracked down on the over-the-counter prohormone segment of the sports nutrition supplement market, listing 25 steroidal compounds as newly criminalized anabolic steroids. The new law also criminalizes very close relatives of explicitly

listed steroids, stating that "a drug or hormonal substance (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone) that is not listed … and is derived from, or has a chemical structure substantially similar to, 1 or more [listed] anabolic steroids [is considered an anabolic steroid] if … [it] has been created or manufactured with the intent of [promoting muscle growth or having pharmacological effects like testosterone or] has been, or is intended to be, marketed or otherwise promoted [to suggest it will promote muscle growth or have pharmacological effects like testosterone]." In other words, derivatives and slight variations on compounds which are on the list can violate the law if they are made, marketed, or intended to be marketed, to build muscle or have effects like testosterone.

DASCA prohibits a compound from being a drug or hormonal substance under the law if it is "an herb or other botanical" or "a concentrate, metabolite, or extract of, or a constituent isolated directly from, an herb or other botanical" or if it is a dietary ingredient (under DSHEA) and "is not anabolic or androgenic." DASCA places the burden of proof upon anyone seeking to claim an exemption.

The new law introduces a new theory by which to prosecute steroid cases by making it a crime to import, export, manufacture, distribute, dispense, sell, offer to sell, or possess with intent to manufacture or sell any anabolic steroid, or any product containing an anabolic steroid, unless it bears a label clearly identifying the anabolic steroid by accepted (IUPAC) nomenclature. This provision would apply to manufacturers who use deceptive or "creative" ingredient labeling to conceal that the product is an anabolic steroid. It would also apply to distributors and retailers who know, intend, or have reasonable cause to believe that the product contains an anabolic steroid.

Under DASCA, the Attorney General is able to add new "designer" compounds to the list of anabolic steroids with greater ease and speed (with only 30 days' notice for temporary scheduling). Criminal penalties can be up to 10 years imprisonment and massive fines (up to $2.5 million on corporations). Civil penalties can be up to $500,000 per product violation for importers, exporters, manufacturers and distributors. Even retailers can be hit with a $25,000 penalty per product violation (and each package size, form, or differently labeled item is a separate product).

By finally fixing the poor construction of its predecessors, DASCA appears to have decimated the over-the-counter prohormone market. However, the continued demand for drug-like muscle-building products fueled a new market of alternatives. Non-steroidal peptide compounds and selective androgen receptor modulators (SARMs) were launched to fill the prohormone void, sold either as dietary supplements or fraudulently as "chemicals for research purposes only."[40] Further, there is nothing to suggest that DASCA will be substantially different in its effect on the traditionally popular anabolic steroid market than its predecessors.

The Effects of Criminalizing Possession

The 1990 law and its successors have had effects on the market. The paper trail requirements associated with controlled substance status have surely discouraged physicians, pharmacists and drug companies from straying into non-medical waters and reduced the number of legitimate, FDA-approved steroids diverted. Controlled substance status also had a chilling effect on legitimate production, prescription and dispensation. With a reduction in a product's availability but no change in consumer demand, new sources of supply generally emerge, just as it happened in the U.S. with alcohol Prohibition in the 1920s. The reduction in supply gave rise to a host of serious societal problems, such as moonshiners, bootleggers, organized crime figures like Al Capone, and "home brewers" whose dangerous tainted alcohol products resulted in some 50,000 deaths.[41] A pair of men in Boston concoted a toxic beverage called "Ginger Jake" that crippled up to 100,000 nationwide.[42] Stifling supply without reducing demand was a horrific failure with alcohol.

The response of the steroid black market to criminalization policies follows the basic economic demand and supply theory. After the enactment of the 1990 law, "friendly physicians" and other sources of diverted FDA-approved products largely disappeared. The vacuum was filled with finished products smuggled from outside the U.S. According to a 2005 report to Congress from the U.S. Government Accountability Office, law enforcement sources found that most anabolic steroids distributed illegally in the United States came from abroad with significant quantities of anabolic steroids coming "from Mexico, as well as other countries such as Russia, Romania, and Greece."[43] For easier importation into the U.S., many of these foreign steroids were labeled as "veterinary" products even though they were clearly manufactured for human use. Other products were smuggled into the country hidden in books or mechanical devices. Organized crime figures emerged, such as Brian the "Steroid King" Wainstein, who fought extradition to the U.S. where he was indicted for his international steroid cartel in multiple districts.[44] When law enforcement efforts struck against these finished products from outside the U.S., the market adapted again. Today, the majority of anabolic steroid products on the market are from home brewers, similar to the scenario associated with alcohol Prohibition. These "kitchen chemists" order and import raw steroid powders from China then mix them with oils or press them into pills to create "underground lab" products labeled on home printers and sold using online forums or on social networking platforms. All of these products completely bypass the paper trail that was of such importance to the proponents of the 1990 law. Moreover, the new underground products are potentially much more dangerous (i.e., contaminated with bacteria or over-dosed) than the FDA-approved products ever were, just as the bathtub gins of the 1920s were worse than the legitimate alcohol products. An investigation by *The Atlanta Journal and Constitution* concluded that 'tougher laws and heightened enforcement'... have fueled thriving counterfeit operations that pose even more severe health risks."[45] Sports journalists noted the failure of the law as early as 2000. "While experts hail the law for scaring off U.S. doctors who once used their lab coats to write steroids prescriptions for athletes, a two-month investigation by ESPN.com shows that by driving the market underground -- to foreign sources such as Mexican pharmacies -- the law failed to achieve its stated goal, of cracking down on illegal steroid use."[46]

Issues of cheating, "hollow victories," "winning at any cost," etc., were an ideological foundation for the 1990 Control Act.[47] "Permitting steroid users to compete with drug-free athletes reflects on the fairness of athletic competition at every level. Allowing those with an unfair advantage to compete can pressure drug-free athletes to use anabolic steroids to remain competitive."[48]

Despite the intent of Congress, the various Control Acts have been of extremely limited value in addressing this "cheating" problem. It is difficult to name a single professional or elite level athlete who was arrested much less imprisoned for possessing an anabolic steroid during the past 27 years. When elite athletes have been exposed as steroid "cheaters," it has been through failed drug tests or anti-doping investigations (e.g., Lance Armstrong) or for accusations of lying about using performance drugs, not taking them (e.g., Barry Bonds). The extremely remote possibility of criminal prosecution deters few if any Olympic and professional level athletes. The most effective way to eradicate anabolic steroids from competitive sports is through systematic drug testing. Athletes who fail the steroid test are prohibited from competing. While testing for anabolic steroids is not perfect, it does remove identified steroid users from the sport and also serves as the most effective deterrent today. Serious athletes devote huge amounts of time, energy and resources into training for an event. The effect of drug testing -- preventing steroid-using athletes from competing -- is both a more effective and more appropriate deterrent than the threat of making overly ambitious athletes into convicted felons. This is especially true because the vast majority of anabolic steroid users are *not* competitive athletes at all, but merely otherwise law-abiding adults who are using the hormones for physical appearance. According to a web-based survey of nearly 2,000 U.S. male steroid users, the typical user is about 30 years old, well-educated, and earning an above-average income in a white-collar occupation.[49] The majority did not use steroids during adolescence and were not motivated by athletic competition or sports performance. Physical self-improvement motivates the unrecognized majority of non-medical AAS users who particularly want to increase muscle mass, strength, and physical

attractiveness. Other significant but less highly ranked factors included increased confidence, decreased fat, improved mood and attraction of sexual partners.

Protecting impressionable young people is a worthy goal. However, given the failure of virtually any elite athletes facing charges under the 1990 law or its successors, the message to young athletes that steroids are "cheating" has not been delivered by federal law. Rather, that message seems to have been exclusively rendered through anti-doping authorities and drug testing scandals. It would seem that the criminalization of steroid possession appears to have done nothing to further the message beyond the anti-trafficking law it superseded.

The criminalization of possession has had some unforeseen effects. It has created a wider gap between the users and the medical community and discouraged illegal users from admitting their steroid usage to physicians. And because some enforcement efforts have targeted physicians, few doctors want anything to do with patients who are taking non-prescribed steroids. The end result is that some illegal users fail to get regular blood pressure checks, cholesterol readings, prostate exams and liver enzyme tests. The input of knowledgeable doctors is absent from considerations of dosage and types/combinations of drugs, which can profoundly impact the potential harms. As one reviewer concluded: "By forbidding trained physicians from administering steroids in a controlled manner, the Legislature has forced [users] to either buy steroids off the black-market or seek out un-ethical and possibly incompetent physicians to supply them steroids.... [I]t appears that Congress' attempt at preventing steroid prescription has at best been futile and at worst harmful."[50]

The Future of U.S. Steroid Laws

The current Administration believes that the war on drugs is essential and must be escalated. Despite a growing consensus from a variety of perspectives that the policy has been a trillion-dollar disaster, it has rejected the reforms of the previous Administration in favor of a tougher approach to criminal justice. "The change in direction … has come at a time when America has been also seeing an increasing number of states liberalizing laws on the consumption and sale of marijuana," notes Lois Beckett in *The Guardian*. "Into this evolving international and national context has stepped [Attorney General] Sessions, with a very different approach. The new attorney general and his initiatives represent a huge setback for advocates who have worked for decades to build bipartisan agreement that America's war on drugs had been a failure and it was time to reverse the damage."[51]

If the war on drugs has failed regarding narcotics, why would the same approach succeed regarding anabolic steroids? Indeed, despite the Anabolic Steroid Control Act of 1990 and its successor laws, illegal steroid use has continued unabated and the potential dangers associated with anabolic steroid use have been significantly increased because of the enforcement of these laws. While anti-steroid experts try to minimize the real-life effects of the criminalization approach upon those apprehended for personal possession, the effects of arrest and prosecution, even where a sentence of incarceration is averted, can be quite devastating. This is especially true since most adult steroid users lead otherwise responsible, law-abiding lives. Persons convicted of a crime ordinarily expect to be punished by probation, confinement, and/or fines. However, a criminal conviction may have collateral consequences that last for decades or even a lifetime. These consequences may have profound effects on current or future employment, housing, education, licensing, immigration, and public benefits.[52] "The collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and their lingering effects have become increasingly difficult to shake off," notes the American Bar Association.[53] Even more troubling, some state controlled substance laws treat steroid possession of even a tiny amount a felony, subjecting personal users to lifelong civil disabilities.

Whether providing criminal penalties for non-medical anabolic steroid possession is the proper and most effective way of dealing with the three anabolic steroid "problems" of concern to

Congress has been questioned for quite some time.[54] The question remains. "[W]e have been told by our government and the medical community that these drugs are 'bad,'" noted one commentator. "Thus, in 1990, the criminalization process began, and the demonization of [steroids] was complete. Nevertheless, we are still besieged with news of positive drug tests amongst athletes, hearings before Congress, and new myths of how [steroids] caused the death of every strong and muscular celebrity who passes on. While it appears that the use of [steroids] may still be on the rise, the criminalization of these drugs has done little to prevent that; it merely changes users into criminals. The solution is flawed…"[55] The late Gary Wadler, MD, consultant to the World Anti-Doping Agency and past presidential administrations, admitted, "It was the law of unintended effects. Back then, no one thought we were taking a step backward by making it a Controlled Substance. But in reality that's exactly what happened."[56]

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[15] 21 U.S.C. § 822(a)(1) and (2).

[16] Crime Control Act of 1990, Pub. L. 101-647, Sec. 1902, 104 Stat. 4851. (amending 21 U.S.C. § 812(c) [1981] to include anabolic steroids)

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[31] USSG § 2D1.1(c).

[32] USSG § 2D1.1 (Note F, Drug Quantity Table).

[33] USSG § 2D1.1 (Note G, Drug Quantity Table). (All vials of injectable steroids are to be converted on the basis of their volume to the equivalent number of 10 cc vials [*e.*g., one 50 cc vial is to be counted as five 10 cc vials]).

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CBD Enforcement Update

by cgmbesqsupcon in Enforcement Report

Cannabidiol (CBD) has received a lot of attention over the last several years. Consumers tout the numerous benefits of CBD and often refer to it as a "miracle" supplement. However, as explained in our article "The Legality of CBD Oil in the United States: A 'High'ly Complex Issue" published in *Natural Products Insider* on March 2, 2018, there is an intricate web of legal and regulatory issues surrounding its sale as a dietary supplement. In addition to some of the hurdles mentioned in the March 2 article, on June 25, 2018, the FDA announced the approval of Epidiolex (the oral CBD drug manufactured by GW Pharmaceuticals, Inc.) for the treatment of seizures associated with Lennox-Gastaut syndrome and Dravet syndrome. Now that CBD is approved as a prescription drug, we may possibly see increased enforcement against those companies marketing and selling CBD as a dietary supplement or food.

Without rehashing the regulatory issues addressed in the article published in *Natural Products Insider*, recently the FDA sent a warning letter to Signature Formulations, LLC (Signature) in part related to the company's CBD products. The warning letter, dated July 31, 2018, noted that the FDA inspected Signature's drug manufacturing facility from October 24 to November 9, 2017. The FDA's inspection resulted in a finding of "significant violations of current good manufacturing practice (CGMP) regulations for finished pharmaceuticals." Signature responded to the FDA's 483 (a 483 is issued at the conclusion of an inspection whereby the FDA lists the violations observed) on December 1, 2017. The July 31, 2018 warning letter explains that many of Signature's responses to the FDA's 483 were deficient and failed to set forth adequate corrective action procedures for addressing the CGMP violations.

Aside from the significant violations of CGMPs, the FDA took the opportunity in this warning letter to specifically address the company's manufacture and sale of products purporting to contain CBD. During the inspection, the FDA reviewed the product label for "CBD Muscle Gel." In addition, the FDA reviewed Signature's website, www.cbdtechcenter.com, where they market and take orders for the following products – CBD CreamLeaf Cream; CBD Muscle Gel; CBD Muscle Mist; Temporary Pain Relief Kit; CBD Oil 100mg, 250mg, 500mg, and 1000mg; CBD Oil Espresso flavor 100mg, 250mg, 500mg, and 1000mg; CBD Salve 50mg and 100mg; and CBD Toothpaste. FDA noted that some of these products were marketed and labeled as dietary supplements, while others were not.

Regarding the CBD products marketed and labeled as dietary supplements, the FDA began by stating, "The claims on your website establish that the products are drugs under section 201(g)(1) of the FD&C Act, 21 U.S.C. 321(g)(1), because they are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease and because they are intended to affect the structure or any function of the body." The warning letter goes on to say that the FDA "has concluded based on available evidence that CBD products are excluded from the dietary supplement definition." The FDA's position has been well documented both on its website and in other warning letters. The FDA has repeatedly stated that CBD is excluded from the definition of a dietary supplement because CBD was not marketed as a dietary supplement or conventional food before CBD was authorized for substantial clinical investigations that were made public.

While this warning letter reiterates the FDA's position regarding CBD, it does provide some insight into the types of issues that lead to FDA enforcement against CBD. First, as noted in the FDA's warning letter, Signature had significant CGMP compliance issues. When a company is inspected by the FDA, it is vital that they respond to the FDA 483 letter in such a way that demonstrates the corrective actions that the company plans to take in order to address the FDA's concerns. Specifically, when it comes to compliance with CGMPs, the FDA is primarily concerned with consumer safety. Failure to provide an appropriate response will

almost guarantee a warning letter. Second, dietary supplements cannot make any claims to diagnose, treat, cure, or prevent any disease. When companies make disease claims, either on the product label or websites, they are easy targets for an FDA warning letter. Disease claims cause dietary supplements to be regulated as misbranded drugs and/or unapproved new drugs.

So, what does this warning letter mean for companies that currently market and sell CBD as a dietary supplement? In short, from a regulatory standpoint, nothing new. The FDA has made its position against CBD as a dietary supplement clear. However, at this point we have not yet seen the FDA send out a warning letter to a company solely for selling CBD as a dietary supplement. Every warning letter related to CBD that we have seen so far has been coupled with the allegation that the company is also making disease claims, failing to follow CGMPs, or both. In some cases, we have also seen FDA warning letters address issues with THC being in the product in detectable amounts. In the future, is it possible that the FDA will target a company based solely on the fact that the product is, or contains, CBD? Sure, it's possible, as that is clearly FDA's position. But for now, making disease claims and/or failing to follow CGMPs puts companies at the highest risk of enforcement.

Jonathan (Jay) Manfre, Esq. – Jay is an associate attorney at Collins Gann McCloskey & Barry, PLLC and serves the day to day regulatory needs of its dietary supplement, sports nutrition, and conventional food clients. Jay has been extensively researching the regulatory and legal issues surrounding CBD and has become an expert in this complex area. If you have any questions regarding CBD please e-mail Jay at Jmanfre@supplementcounsel.com

In today's regulatory climate, where FDA, FTC, state attorneys general, industry self-regulatory organizations, class action lawyers, and even individual U.S. Senators are leading a patchwork of crusades against dietary supplement and cosmetics companies, it is vital to keep up to date with the latest enforcement efforts and trends. We regularly send out emails summarizing the latest enforcement actions (opt in; we never share our subscription list, and you can opt out at any time at the bottom of each email). Please share them! Learning from others' mistakes is cheaper than learning firsthand what kinds of practices and violations lead to enforcement.

If you have a dietary supplement or cosmetics company and have any questions about your responsibilities under the law, including label claims, labeling requirements, advertising review, CGMPs, or anything else, give us a call anytime at 516-294-0300 or e-mail us at info@supplementcounsel.com.

Potential Role of Hemp-derived Full-Spectrum CBD Oil in Rehabilitation and Physical Therapy

1

BY HECTOR LOPEZ, MD, CSCS, FAAPMR, FISSN ON SEPTEMBER 5, 2018 PT

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Should physical therapists augment their therapeutic practice with the strategic use of CBD-rich hemp oil extract?

The endocannabinoid system (ECS) is a master endogenous regulatory, adaptogenic set of lipid-based compounds (endocannabinoids), specialized cannabinoid receptors they bind to and enzymes responsible for synthesizing and metabolizing those very same endocannabinoids. One of the interesting distinctions with endocannabinoid lipid mediators (e.g., Anandamide, 2-AG, PEA, and OEA) is that they are synthesized and released 'on demand,' as opposed to other neurotransmitters (e.g., glutamate, GABA, 5-HTP, etc.) that are stored in vesicles and released 'upon stimulation.' This implies that the endocannabinoid system is more sensitive to real-time environmental and mechanical stimuli, such as an orthopedic or connective/ musculoskeletal tissue injury. Moreover, there is clear evidence of endocannabinoid

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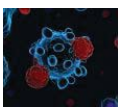

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compounds and hemp-derived phytocannabinoids (plant-Cannabis derived) promoting restoration and remodeling of healthy bone, tendon, ligament, muscular and connective tissue integrity via a healthy inflammatory and resolution response.

Rehabilitation and physical therapy professionals concerned with the treatment or improvement of the musculoskeletal, orthopedic, nervous system and connective tissue would benefit from optimizing the endocannabinoid system (*e.g., from Physical Therapist to Physiatrist, Orthopedic Surgeon, Pain Physician, Neurologist, to Athletic Trainer or Strength/Conditioning Professional*). Supplementing with a phytocannabinoid-rich CBD hemp extract product may complement lifestyle factors for optimizing the ECS: routine exercise, adequate sleep, stress management techniques and a diet focused on high-quality fats (weighted toward Omega-3), complete protein while limiting hyper-palatable foods and caloric excess.

The occurrence of chronic stress, depression, and anxiety can increase nociception or peripherally perceived pain in humans and may facilitate the transition from acute, localized to widespread chronic pain. Chronic pain and psychophysiological factors that interact with the pain-modulating system can lead to fear-avoidant behavior that may severely limit the rehabilitation potential of patients undergoing physical therapy. As such, it is no surprise that Lomazzo et al. demonstrated that enhancing endocannabinoid signaling is a potential treatment strategy using an animal model for chronic pain associated with chronic stress and negative psychological overly. The connection between the ECS and orthopedic conditions that physical therapists are often tasked with managing doesn't end with stress/anxiety conditions that amplify pain states, as cannabinoid receptors have been characterized on chondrocytes, fibroblasts, tenocytes, bone, synovial and muscle, suggesting a role of cannabinoids in musculoskeletal remodeling, rehabilitation and recovery.

Finally, it has been well-established that inflammation and pro-inflammatory cytokines play a significant role in the pathology, treatment, and rehabilitation of active orthopedic, joint and post-surgical conditions where physical therapy is paramount. Animal and human studies have demonstrated that activation of cannabinoid receptors attenuate inflammation and nociceptive processing in models of musculoskeletal and joint inflammation. Interestingly, several NSAID COX (cyclooxygenase) inhibitors have also been shown to inhibit FAAH (fatty acid amide hydrolase), which suggests that the endocannabinoid system may be a secondary target in addition to prostaglandins and leukotrienes.

Full-spectrum agricultural hemp extracts, rich in CBD, provide a wide range of phytocannabinoids, terpenes, flavonoids and supportive bioactive constituents that result in a more linear dose-dependent therapeutic response than 99% CBD isolates. CBD oil products on the market may not explicitly disclose that this phenomenon has been described in animal models comparing the anti-inflammatory and nociceptive properties of whole-plant extracts with the synergies of a matrix of bioactives from agricultural hemp vs. CBD isolates (Gallily R et al. 2015). Moreover, human clinical trials examining effects of cannabinoids on public-speaking induced anxiety and chronic neuropathic pain have also demonstrated the dose-response differences, in addition to increased efficacy and "entourage" effect from smaller doses of a combination of phytocannabinoids vs. either CBD or THC in isolation (Zuardi AW et al. 2017 and Johnson JR et al., 2010). This class of hemp-derived, CBD-rich bioactive nutraceuticals may have an unusually broad (or wide) therapeutic index relative to other botanical extracts. In essence, it is a great idea to start with small doses and titrate up over a 1-2 week period until the patient or consumer feels an acceptable level of benefit (efficacy) while avoiding any adverse responses such as somnolence (sleepiness) or any other undesirable effect. However, due to the broad therapeutic index, many integrative and functional medicine practitioners are often surprised by how two patients, each with similar goals and presentations end up requiring doses sometimes as varied as 3x-6x fold difference, yet without "adverse responses."

Look for brands of CBD Oil that pay particular attention to professional and consumer education, quality control/ assurance, independent safety toxicology studies on the actual product sold into commerce, and supply chain measures from seed to shelf that not only meets but far exceeds federal regulatory compliance requirements. This will bring rehabilitation and physical therapy professionals, practitioners, patients and consumers alike, a unique level of reassurance.

Hence, it follows that physical therapists may augment or integrate their therapeutic practice with the strategic use of CBD-rich hemp oil extract for optimizing the ECS and thereby improve the efficacy and potential outcomes of patients.

Study: Cannabidiol can Offer Anti-Psychotic Effects

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SPORT

Athletes Turn to CBD to Improve Performance and Recovery

By Nickolaus Hines • September 20, 2018 •

Athletes endure a lot of pressure on their bodies. It doesn't matter what the type of sport is—endurance or sprint, contact or racing, solo or team—athletes push themselves to the breaking point with every new workout and competition. To cope with the stresses on their body, traditional wisdom has athletes reaching for ibuprofen or another over-the-counter anti-inflammatory or pain reliever. CBD is a natural option that's quickly on the rise.

From athletes at the top of their game to those staying healthy and increasing their longevity, CBD is already a part of their routine. In 2016, Eugene Monroe, at the time an offensive tackle for the Baltimore Ravens, advocated for the NFL to allow players to use cannabinoids rather than opioids for chronic pain and sports-related injuries. He was the first active NFL player to do so. Shortly after, Derrick Morgan, a player for the Tennessee Titans, became the second active NFL player to publicly pressure the league to change its policy on cannabis, and he was a founding member of the NFL Player's Association committee on pain management.

They're far from alone. Andrew Talansky and Floyd Landis, both professional cyclists, mixed martial arts fighter Gina Mazany, and UFC fighter Nate Diaz are all public supporters of using CBD before and after workouts and competitions. In January of 2018, they received good news from the World Anti-Doping Agency (WADA) and the United States Anti-Doping Agency (USADA): CBD was officially removed from the prohibited substance list. These agencies officially govern doping for the Olympics, but also strongly influence the policies of other athletic organizations.

Why that decision is important to athletes was perhaps put best by Diaz in 2016 during a post-fight interview when he was asked about the vape pen he was using.

"It's CBD," Diaz said. "It helps with the healing process and inflammation, stuff like that. So you want to get these [vape pens] for before and after the fights, [and] training. It'll make your life a better place."

Benefits of Using CBD as a Pre- and Post-workout Supplement

"Medical marijuana gets most of the credit for easing chronic pain, and studies have shown that its an effective tool in reducing nerve and muscle pain. That's not an option for professional and many amateur athletes, however, as THC is a widely banned substnace. Cannabidiol, on the other hand, is a widely accepted substitute.

"CBD is a powerful anti-epileptic, anti-depressant, anti-inflammatory, anti-nauseate, sleep aid, muscle relaxant, sedative and anti-proliferative," David Bearman, a doctor who specializes in pain management and cannabis, wrote for HuffPost in 2017.

The reason for this is due to how CBD naturally binds to the human body's endocannabinoid system. The endocannabinoid system refers to the receptors in the body that, among other things, work to keep the body in a state of homeostasis.

There's "enormous potential for all individuals looking to optimize health and human performance via balancing the endocannabinoid system," says Dr. Hector Lopez, an advisor at PlusCBD Oil and a consultant to athletes in the NFL, NBA, MLB, NHL, and FIFA. "The endocannabinoid system is critical to balancing most major organ systems in the body, and hence has a broad and wide-ranging influence on the entire body."

In simple terms, ingesting CBD helps your body maintain a stable state and reduces inflammation in your muscles and tissue.

CBD's effectiveness depends on when you take it in your workout. As of now, there haven't been many studies on how CBD can help you pre-workout. Two studies conducted in 2017 by the National Center for Biotechnology Information (NCBI) found that CBD lowers blood pressure, lowers heart rate, and acts as a vasorelaxant, meaning it reduces the tension in blood vessel walls. Body builders take vasorelaxants before workouts to increase blood flow. Dr. Andrew Kerklaan, a doctor who developed a line of CBD creams sold under the brand name Dr. Kerklaan Therapeutics, says that CBD can be used as a pre-workout. Pre-workout CBD makes injuries less likely and improves "performance as a result of improved muscle tension and pain," he says.

However, more studies need to be done to determine the full effects of CBD as a pre-workout. CBD's effectiveness as part of a post-workout routine is more understood.

"For the most part, CBD and other phytocannabinoid extracts will play a larger beneficial role in recovery (post-workout) from intense training and exercise," Dr. Lopez says.

CBD suppresses inflammation and pain, an NCBI study from 2012 found. Another study in 2016 conducted for the NCBI found similar results. There aren't studies directly linking CBD and post-workout treatments, but there's strong reason to believe it could be effective. Dr. Brook Henry, a researcher at University of California,

San Diego's Center for Medical Cannabis Research, told Refinery29 that "there is a plausible biological pathway that might explain how CBD administration could potentially reduce discomfort associated with exercise."
Another benefit is that CBD doesn't have psychological side effects. In 2006, a study done by the NCBI found that cannabidiols "have potent anti-inflammatory and analgesic properties without any overt behavioral or psychoactive effects." In other words, you won't get a high from CBD like you would with other muscle relaxants. Athletes can take CBD and go about their day without losing productivity. That's especially important when taking CBD before a competition or a workout, when staying alert is necessary.

The Neuroprotective Aspects of CBD for Contact-sport Athletes

There's no question that spending years in the NFL will cause neurological damage. The degenerative brain disease Chronic Traumatic Encephalopathy, or CTE, was found in 99 percent of the brains of deceased NFL players that donated their bodies to research, according to the Journal of the American Medical Association.

CBD may help protect the brain. The federal government recognized CBD's neuroprotective qualities in a CBD patent it filed back in 1998. It states that "cannabinoids are found to have particular application as neuroprotectants," adding that "nonpsychoactive cannabinoids, such as cannabidiol, are particularly advantageous to use because they avoid toxicity that is encountered with psychoactive cannabinoids at high doses useful in the method of the present invention."

Acceptance in Athletics

The World Anti-Doping Agency removed cannabidiol from the banned substance list in 2018.

"While this is just one step in the right direction by WADA for allowing competitive athletes access to neuroprotective and restorative bioactive ingredients, clearly limiting the use to just isolated and purified CBD does not quite go far enough to address the nuances of supplementing with safe, tested, and reliable hemp-derived CBD sources," Dr. Lopez says.

Many national sports teams in the U.S. still ban CBD.

The Best Way For Athletes to Take CBD

Athletes have a variety of options when it comes to how they want to take CBD. Topical creams are fast acting and localized, and are best for use “during a massage or post-massage for muscle and workout recovery,” Kerklaan says. Tinctures and oils are better for a more generalized effect.

"Topical delivery of CBD can be quite variable at the moment for systemic bioavailability (concentration of delivered CBD that appears in the blood and is absorbed into circulation) depending on the delivery and manufacturing technology," Dr. Lopez says. "For the most part, there may still be unexplored benefits from delivering CBD topically beyond systemic absorption due to the presence of cannabinoid receptors and the delivering CBD topically beyond systemic absorption due to the presence of cannabinoid receptors and the elements of the endocannabinoid system within the epidermis, dermis, and hypodermis that interact with sensory and motor peripheral nervous system, immune system and lymphatics, and endocrine functions with cytokines and various hormones.

"The most reliable method of administration is still oral and oral-mucosal via softgel (due to dose standardization), and spray or dropper of tincture," Dr. Lopez continues. "These methods utilize a lipid or oil based vehicle, which has also been shown to improve the bioavailability of CBD and other phytocannbinoids."

Benefits of Using CBD Before Competitions

Studies on animals and humans have shown that cannabidiol reduces social anxiety. That puts it in the class of anxiety reducing drugs known as anxiolytics, which also includes benzodiazepines like Xanax, Klonopin, and others. Only without the risk of dependency.

CBD has also been known to reduce performance anxiety. In a 1993 study published in the Journal of Psychopharmacology, researchers measured the anxiety of volunteers during a public speaking exercise. Half of the volunteers took CBD, and those that did had decreased anxiety during the test. Of course, unless you consider the spelling bee a sport, public speaking isn't high on the list of benefits that athletes are looking for when taking CBD. The study is relevant to athletes, however, when looked at alongside other studies measuring the anxiolytic impact of CBD. A 2010 study in the Journal of Psychopharmacology found that cannabidiol reduces general anxiety as well as performance anxiety. For athletes, that means less stress before and during a competition or event.

Pain relief is the number one reason for athletes to turn to CBD. It's safer and less addictive than opioids, and may be as effective as some over-the-counter anti-inflammatory drugs. But the additional benefits—neuroprotective qualities, anti-anxiety and post-workout supplement—are other reasons CBD is emerging as a training and treatment aid for some of today's top competitors.

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Health & Fitness Supplement News

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SARMs – The Final Countdown

by Jay Manfre

Consumers demand the most powerful and effective supplements to increase strength, energy, and performance. After ephedra was banned, companies searched for the next best stimulant product, and eventually DMAA (1,3-dimethylanamine) flooded the market. When anabolic steroids were officially listed as schedule III-controlled substances, chemists began formulating chemical compounds that would not "violate" the law. So began the "prohormone era" of the supplement world. Prohormones were marketed and sold as dietary supplements up until 2014 when President Obama signed the Designer Anabolic Steroid Control Act (DASCA). Although prohormones are illegal under DASCA, it has not stopped the search for comparable alternatives.

Enter SARMs - Selective Androgen Receptor Modulators. Although SARMs are often referred to as "new," they were discovered approximately twenty years ago. SARMs are non-steroidal compounds that selectively bind to androgen receptors in specific sites, such as skeletal muscle and bone. They have the ability to be more anabolic as opposed to more androgenic. This offers the potential for increased muscle growth while reducing the likelihood of undesirable side effects that can be caused by steroids – acne, prostate enlargement, hair growth in women, etc. Although there are many different SARMs being investigated by pharmaceutical companies, Ostarine®, a.k.a. MK-2866 and GTx-024, is the most well-known. It is currently being investigated by the pharmaceutical company GTx, Inc. as a treatment for women with Stress Urinary Incontinence.

It didn't take long for athletes and bodybuilders to begin using SARMs to build muscle and enhance performance. In 2008, the World Anti-Doping Agency (WADA) banned SARMs. Although banned by WADA, companies began selling SARMs as "Dietary Supplements." It is likely that dietary supplement companies saw SARMs as a potential "legal" way to fill the void left in the market after prohormones were banned. DASCA criminalizes the manufacture, sale, and possession of steroids and derivatives and slight variations on compounds that are listed. From a chemical standpoint SARMs are non-steroidal and they are not a derivative or variation of that structure. However, the Food and Drug Administration has publicly stated that SARMs are not dietary supplements.

The Dietary Supplement Health and Education Act (DSHEA) defines a dietary supplement as "a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or a concentrate metabolite, constituent, extract, or combination [thereof]." SARMs are not a vitamin, mineral, herb or other botanical, or amino acid. They are synthetic chemical compounds not found in nature or food. It is also not likely that SARMs are a "dietary substance for use by man to supplement the diet by increasing the total dietary intake."

Although SARMs do not fit the above definitions DSHEA also states that dietary supplements do not include "an article authorized for investigation as a new drug… for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, which was not before such approval, certification, licensing, or authorization marketed as a dietary supplement or as a food..." Some SARMs are being investigated as new drugs by pharmaceutical companies and are currently undergoing clinical investigations that have been made public. FDA has pointed to this fact in several warning letters sent to companies that sell, or sold, SARMs as dietary supplements. FDA also states that SARMs are "prescription drugs" because they are not safe for use except under the supervision of a licensed practitioner.

Although FDA has opined that SARMs are not dietary supplements, SARMs are still being sold as "research chemicals" over the Internet. Whether or not the DEA will be able to effectively police this area of distribution remains to be seen. However, it is quite clear, if you are going to sell SARMs as an ingredient in -- or as -- a dietary supplement, expect a warning letter and possible legal action from FDA.

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[i] *https://www.govtrack.us/congress/bills/113/hr4771/text*
[ii] *Dalton, J; "Discovery of Nonsteroidal Androgens"; Biochemical and Biophysical Research Communications; Volume 244, Issue 1, 6 March 1998, Pages 1–4; Retrieved from http://www.sciencedirect.com/science/article/pii/S0006291X98982092*
[iii] *http://www.gtxinc.com/pipeline/*
[iv] *https://www.wada-ama.org/sites/default/files/prohibited_list_2018_en.pdf*
[v] *http://www.steroidlaw.com/2014/12/designer-anaboloic-steroid-control-act-signed-by-president-obama/*
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[vii] *https://ods.od.nih.gov/About/DSHEA_Wording.aspx*
[viii] *https://ods.od.nih.gov/About/DSHEA_Wording.aspx*
[ix] *http://phx.corporate-ir.net/phoenix.zhtml?c=148196&p=irol-newsArticle&ID=2300266*
[x] *https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2017/ucm582464.htm*

WHAT SERVICES DOES CGMB OFFER?

In the ever-changing landscape of the health, fitness and nutrition industries, you need to stay ahead of the curve. Could you survive an investigation of your products, your labels, or your advertising copy? How do you navigate the maze of new regulations … and run your business at the same time? With FDA policies actively evolving, how can you bring a New Dietary Ingredient to market in compliance with DSHEA? How can you ensure your advertising complies with FTC regulations? What must you do in order to comply with the dietary supplement cGMPs?

Collins Gann McCloskey & Barry PLLC (CGMB), is a law firm dedicated to helping clients in the health, fitness and nutrition communities. With recognized experts in sports performance supplements and regulatory, advertising and marketing law, CGMB offers a powerful bi-coastal team providing a variety of legal services to a whole range of companies from start-ups to established organizations. CGMB offers in-depth experience and personalized attention you can trust to get you the answers you need ... when you need them. The partners of CGMB have been formally rated by the professional legal community as practicing at the highest levels of skill and ethical integrity (AV-rated in Martindale-Hubbell). CGMB can help you stay ahead of the curve.

- Are all your product names and intellectual property protected?
- Have your product labels been reviewed by legal counsel?
- Do you have proper licensing and manufacturing agreements in place?
- Are you covered by adequate indemnification agreements?
- Are all your ingredients DSHEA-compliant?
- How can you bring a New Dietary Ingredient to market or obtain GRAS status?
- Do you have SOPs for recording and reporting Serious Adverse Events?
- How can you substantiate your claims to satisfy FDA, FTC, and other federal and state regulatory agencies?
- Do you have proper insurance coverage and SOPs for customer complaints?
- Have you received a Civil Investigative Demand from the FTC?
- Have you been served with a Class Action suit? How would you handle one?
- Could you survive a 483 inspection?
- Could you survive an investigation of your facility, products, labels or claims?
- Are you fully compliant with cGMPs?

The best time to ensure compliance with the law is up-front, before there's a problem!

Feel free to call us at (516) 294-0300

CGMB - Selected Firm Profiles

Rick Collins, Esq., is based in New York and provides advice to some of the top names in the sports nutrition industry, and is the legal advisor to the International Society of Sports Nutrition and the International Federation of BodyBuilders. He has defended dietary supplement and sports nutrition companies against claims of distribution of misbranded or adulterated products and against serious criminal investigations by FDA and DEA. He is admitted to practice in the courts of New York, Massachusetts, Pennsylvania, Texas and the District of Columbia, and in numerous federal courts.

Alan Feldstein, Esq., an attorney based in Los Angeles and admitted to practice in California, serves Of Counsel to CGMB. He is responsible for advising some of the firm's biggest clients in the sports nutrition industry and has extensive experience with contracts, copyright and trademarks, label and advertising review, supplement fact panel review, claims substantiation and assorted regulatory issues. He brings with him more than a dozen years of advertising and marketing law experience and continues to serve on the adjunct faculty of Southwestern University School of Law.

Jonathan Manfre, Esq. (Jay), is an associate attorney at Collins Gann McCloskey & Barry PLLC. He graduated from New York Law School in June 2015. Jay has been weight training for over twelve years, has competed in two bodybuilding competitions, and has been a consumer of dietary supplements since the age of 18. He is extremely familiar with the regulations of the dietary supplements/sports nutrition industry and very knowledgeable when it comes to effects and function of these supplements.

For more information about CGMB, industry news and updates visit www.supplementcounsel.com.

ATTORNEY ADVERTISING

FDA and Marijuana: Questions and Answers

1. How is marijuana therapy being used by some members of the medical community?
2. Why hasn't the FDA approved marijuana for medical uses?
3. Is marijuana safe for medical use?
4. How does FDA's role differ from the role of other federal agencies when it comes to the investigation of marijuana for medical use?
5. Does the FDA object to the clinical investigation of marijuana for medical use?
6. What kind of research is the FDA reviewing when it comes to the efficacy of marijuana?
7. How can patients get into expanded access program for marijuana for medical use?
8. Does the FDA have concerns about administering a cannabis product to children?
9. Does the FDA have concerns about administering a cannabis product to pregnant and lactating women?
10. What is FDA's reaction to states that are allowing marijuana to be sold for medical uses without the FDA's approval?
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12. Can products that contain THC or cannabidiol (CBD) be sold as dietary supplements?
13. Is it legal, in interstate commerce, to sell a food to which THC or CBD has been added?
14. In making the two previous determinations about THC, why did FDA conclude that THC is an active ingredient in a drug product that has been approved under section 505 of the FD&C Act? In making the two previous determinations about CBD, why did FDA determine that substantial clinical investigations have been authorized for and/or instituted, and that the existence of such investigations has been made public?
15. Will FDA take enforcement action regarding THC and CBD products that are marketed as dietary supplements? What about foods to which THC and CBD has been added?
16. What does the FDA think about making cannabidiol available to children with epilepsy?
17. What should I do if my child eats something containing marijuana?
18. I've seen marijuana products being marketed for pets. Are they safe?
19. Can I give my pet marijuana products for medical purposes, such as to relieve the pain of a sick or dying pet?
20. I gave my pet marijuana and I'm concerned my pet is suffering adverse effects. What should I do?
21. Has the agency received any adverse event reports associated with marijuana for animals?
22. What is FDA doing about marijuana products currently on the market for pets?

23. **What is the effect of section 7606 of the Agricultural Act of 2014 (sometimes known as the "industrial hemp" provision of the Farm Bill) on the FD&C Act?**

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1. How is marijuana therapy being used by some members of the medical community?

A. The FDA is aware that marijuana or marijuana-derived products are being used for a number of medical conditions including, for example, AIDS wasting, epilepsy, neuropathic pain, treatment of spasticity associated with multiple sclerosis, and cancer and chemotherapy-induced nausea.

2. Why hasn't the FDA approved marijuana for medical uses?

A. To date, the FDA has not approved a marketing application for marijuana for any indication. The FDA generally evaluates research conducted by manufacturers and other scientific investigators. Our role, as laid out in the Federal Food, Drug, and Cosmetic (FD&C) Act, is to review data submitted to the FDA in an application for approval to assure that the drug product meets the statutory standards for approval.

The FDA has approved Epidiolex, which contains a purified drug substance cannabidiol, one of more than 80 active chemicals in marijuana, for the treatment of seizures associated with Lennox-Gastaut syndrome or Dravet syndrome in patients 2 years of age and older. That means the FDA has concluded that this particular drug product is safe and effective for its intended indication.

The agency also has approved Marinol and Syndros for therapeutic uses in the United States, including for the treatment of anorexia associated with weight loss in AIDS patients. Marinol and Syndros include the active ingredient dronabinol, a synthetic delta-9- tetrahydrocannabinol (THC) which is considered the psychoactive component of marijuana. Another FDA-approved drug, Cesamet, contains the active ingredient nabilone, which has a chemical structure similar to THC and is synthetically derived.

3. Is marijuana safe for medical use?

A. The study of marijuana in clinical trial settings is needed to assess the safety and effectiveness of marijuana for the treatment of any disease or condition.

The FDA will continue to facilitate the work of companies interested in appropriately bringing safe, effective, and quality products to market, including scientifically-based research concerning the medicinal uses of marijuana.

4. How does FDA's role differ from the role of other federal agencies when it comes to the investigation of marijuana for medical use?

A. Conducting clinical research using marijuana involves interactions with several federal agencies. This includes: a registration administered by the Drug Enforcement Administration (DEA); obtaining the marijuana for research from the National Institute on Drug Abuse (NIDA), within the National Institutes of Health, or another DEA-registered source; and review by the FDA of an investigational new drug (IND) application and research protocol. Additionally:

- As a Schedule I controlled substance under the Controlled Substances Act, DEA provides researchers with investigator and protocol registrations and has Schedule I-level security requirements at the site marijuana will be studied.
- NIDA provides research-grade marijuana for scientific study. The agency is responsible for overseeing the cultivation of marijuana for medical research and has contracted with the University of Mississippi to grow marijuana for research at a secure facility. Marijuana of varying potencies and compositions is available. DEA also **may allow additional growers (https://www.federalregister.gov/documents/2016/08/12/2016-**

17955/applications-to-become-registered-under-the-controlled-substances-act-to-manufacture-marijuana-to) to register with the DEA to produce and distribute marijuana for research purposes.

- Researchers work with the FDA and submit an IND application to the appropriate division in the Office of New Drugs, in the Center for Drug Evaluation and Research (CDER), depending on the therapeutic indication.

The roles of the three agencies are the same for investigations of marijuana for use as an animal drug product, except that researchers would establish an investigational new animal drug (INAD) file with the Center for Veterinary Medicine to conduct their research, rather than an IND with CDER.

5. Does the FDA object to the clinical investigation of marijuana for medical use?

A. No. The FDA believes that scientifically valid research conducted under an IND application is the best way to determine what patients could benefit from the use of drugs derived from marijuana. The FDA supports the conduct of that research by:

1. Providing information on the process needed to conduct clinical research using marijuana.
2. Providing information on the specific requirements needed to develop a drug that is derived from a plant such as marijuana. In June 2004, the FDA finalized its **Guidance for Industry: Botanical Drug Products (/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM458484.pdf)**, which provides sponsors with guidance on submitting IND applications for botanical drug products.
3. Providing specific support for investigators interested in conducting clinical research using marijuana and its constituents as a part of the IND process through meetings and regular interactions throughout the drug development process.
4. Providing general support to investigators to help them understand and follow the procedures to conduct clinical research through the FDA Center for Drug Evaluation and Research's **Small Business and Industry Assistance (/Drugs/DevelopmentApprovalProcess/SmallBusinessAssistance/ucm2007049.htm)** group.

6. What kind of research is the FDA reviewing when it comes to the efficacy of marijuana?

A. The FDA reviews applications to market drug products to determine whether those drug products are safe and effective for their intended indications. The FDA reviews scientific investigations, including adequate and well-controlled clinical trials, as part of the FDA's drug approval process.

The FDA relies on applicants and scientific investigators to conduct research. Our role, as outlined in the Federal Food, Drug, and Cosmetic Act, is to review data submitted to the FDA in a marketing application to determine whether a proposed drug product meets the statutory standards for approval. Additional information concerning research on the medical use of marijuana is available from the National Institutes of Health, particularly the **National Cancer Institute (http://www.cancer.gov/)** (NCI) and **NIDA (http://www.drugabuse.gov/drugs-abuse/marijuana/nida-research-therapeutic-benefits-cannabis-cannabinoids)**.

7. How can patients get into expanded access program for marijuana for medical use?

A. Manufacturers may be able to make investigational drugs available to individual patients in certain circumstances through expanded access, as described in the FD&C Act and implementing regulations.

8. Does the FDA have concerns about administering a cannabis product to children?

A. We understand that parents are trying to find treatments for their children's medical conditions. However, the use of untested drugs can have unpredictable and unintended consequences. Caregivers and patients can be confident that FDA-approved drugs have been carefully evaluated for safety, efficacy, and quality, and are monitored by the

FDA once they are on the market. The FDA continues to support sound, scientifically-based research into the medicinal uses of drug products containing marijuana or marijuana constituents, and will continue to work with companies interested in bringing safe, effective, and quality products to market.

9. Does the FDA have concerns about administering a cannabis product to pregnant and lactating women?

A. The FDA is aware that there are potential adverse health effects with use of marijuana in pregnant or lactating women. Published scientific literature reports potential adverse effects of marijuana use in pregnant women, including fetal growth restriction, low birth weight, preterm birth, small-for-gestational age, neonatal intensive care unit (NICU) admission, and stillbirth. [**1**, **2**, **3**] Based on published animal research, there are also concerns that use of marijuana during pregnancy may negatively impact fetal brain development. [**4**, **5**, **6**] The American College of Obstetricians and Gynecologists (ACOG) recommends that women who are pregnant or contemplating pregnancy should be encouraged to discontinue marijuana use. In addition, ACOG notes that there are insufficient data to evaluate the effects of marijuana use on breastfed infants; therefore, marijuana use is discouraged when breastfeeding. [**7**] Pregnant and lactating women should talk with a health care provider about the potential adverse health effects of marijuana use.

10. What is FDA's reaction to states that are allowing marijuana to be sold for medical uses without the FDA's approval?

A. The FDA is aware that several states have either passed laws that remove state restrictions on the medical use of marijuana and its derivatives or are considering doing so. It is important to conduct medical research into the safety and effectiveness of marijuana products through adequate and well-controlled clinical trials. We welcome the opportunity to talk with states who are considering support for medical research of marijuana and its derivatives to provide information on Federal and scientific standards.

11. Has the agency received any adverse event reports associated with marijuana for medical conditions?

A. The agency has received reports of adverse events in patients using marijuana to treat medical conditions. The FDA is currently reviewing those reports and will continue to monitor adverse event reports for any safety signals attributable to marijuana and marijuana products, with a focus on serious adverse effects associated with the use of marijuana.

Information from adverse event reports regarding marijuana use is extremely limited; the FDA primarily receives adverse event reports for approved products. General information on the potential adverse effects of using marijuana and its constituents can come from clinical trials using marijuana that have been published, as well as from spontaneously reported adverse events sent to the FDA. Additional information about the safety and effectiveness of marijuana and its constituents is needed. Clinical trials of marijuana conducted under an IND application could collect this important information as a part of the drug development process.

12. Can products that contain THC or cannabidiol (CBD) be sold as dietary supplements?

A. No. Based on available evidence, FDA has concluded that THC and CBD products are excluded from the dietary supplement definition under sections 201(ff)(3)(B)(i) and (ii) of the FD&C Act, respectively. Under those provisions, if a substance (such as THC or CBD) is an active ingredient in a drug product that has been approved under 21 U.S.C. § 355 (section 505 of the FD&C Act), or has been authorized for investigation as a new drug for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, then products containing that substance are outside the definition of a dietary supplement. FDA considers a substance to be "authorized for investigation as a new drug" if it is the subject of an Investigational New

Drug application (IND) that has gone into effect. Under FDA's regulations (21 CFR 312.2), unless a clinical investigation meets the limited criteria in that regulation, an IND is required for all clinical investigations of products that are subject to section 505 of the FD&C Act.

There is an exception to sections 201(ff)(3)(B)(i) and (ii) if the substance was "marketed as" a dietary supplement or as a conventional food before the drug was approved or before the new drug investigations were authorized, as applicable. However, based on available evidence, FDA has concluded that this is not the case for THC or CBD. For more information on this provision, including an explanation of the phrase "marketed as," see **Draft Guidance for Industry: Dietary Supplements: New Dietary Ingredient Notifications and Related Issues (/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm257563.htm)**.

FDA is not aware of any evidence that would call into question its current conclusions that THC and CBD products are excluded from the dietary supplement definition under sections 201(ff)(3)(B)(i) and (ii) of the FD&C Act. Interested parties may present the agency with any evidence that they think has bearing on this issue. Our continuing review of information that has been submitted thus far has not called our conclusions into question.

13. Is it legal, in interstate commerce, to sell a food to which THC or CBD has been added?

A. No. Under section 301(ll) of the FD&C Act, it is prohibited to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which has been added a substance which is an active ingredient in a drug product that has been approved under 21 U.S.C. § 355 (section 505 of the Act) or a drug for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public. There are exceptions, including when the drug was marketed in food before the drug was approved or before the substantial clinical investigations involving the drug had been instituted or, in the case of animal feed, that the drug is a new animal drug approved for use in feed and used according to the approved labeling. However, based on available evidence, FDA has concluded that none of these is the case for THC or CBD. FDA has therefore concluded that it is a prohibited act to introduce or deliver for introduction into interstate commerce any food (including any animal food or feed) to which THC or CBD has been added. FDA is not aware of any evidence that would call into question these conclusions. Interested parties may present the agency with any evidence that they think has bearing on this issue. Our continuing review of information that has been submitted thus far has not called our conclusions into question.

14. In making the two previous determinations about THC, why did FDA conclude that THC is an active ingredient in a drug product that has been approved under section 505 of the FD&C Act? In making the two previous determinations about CBD, why did FDA determine that substantial clinical investigations have been authorized for and/or instituted, and that the existence of such investigations has been made public?

A. THC (dronabinol) is the active ingredient in the approved drug products, Marinol capsules (and generics) and Syndros oral solution.

The existence of substantial clinical investigations regarding CBD has been made public. For example, two such substantial clinical investigations include GW Pharmaceuticals' investigations regarding Sativex and Epidiolex. (See **Sativex Commences US Phase II/III Clinical Trial in Cancer Pain (https://www.gwpharm.com/about-us/news/sativex%C2%AE-commences-us-phase-iiiii-clinical-trial-cancer-pain) (http://www.fda.gov/AboutFDA/AboutThisWebsite/WebsitePolicies/Disclaimers/default.htm)** and **GW Pharmaceuticals Receives Investigational New Drug (IND) from FDA for Phase 2/3 Clinical Trial of Epidiolex in the Treatment of Dravet Syndrome (https://www.gwpharm.com/about-us/news/gw-pharmaceuticals-receives-investigational-new-drug-ind-fda-phase-23-clinical-trial) (http://www.fda.gov/AboutFDA/AboutThisWebsite/WebsitePolicies/Disclaimers/default.htm)**).

15. Will FDA take enforcement action regarding THC and CBD products that are marketed as dietary supplements? What about foods to which THC and CBD has been added?

A. When a product is in violation of the FD&C Act, FDA considers many factors in deciding whether or not to initiate an enforcement action. Those factors include, among other things, agency resources and the threat to the public health. FDA also may consult with its federal and state partners in making decisions about whether to initiate a federal enforcement action.

16. What does the FDA think about making cannabidiol available to children with epilepsy?

A. The FDA has approved Epidiolex, which contains a purified drug substance cannabidiol, one of more than 80 active chemicals in marijuana, for the treatment of seizures associated with Lennox-Gastaut syndrome or Dravet syndrome in patients 2 years of age and older. That means the FDA has concluded that this particular drug product is safe and effective for its intended indication.

17. What should I do if my child eats something containing marijuana?

A. It is important to protect children from accidental ingestion of marijuana and products containing marijuana. FDA recommends that these products are kept out of reach of children to reduce the risk of accidental ingestion.

If the parent or caregiver has a reasonable suspicion that the child ingested products containing marijuana, the child should be taken to a physician or emergency department, especially if the child acts in an unusual way or is/feels sick.

18. I've seen marijuana products being marketed for pets. Are they safe?

A. FDA has recently become aware of some marijuana products being marketed to treat diseases in animals. We want to stress that FDA has not approved marijuana for any use in animals, and the agency cannot ensure the safety or effectiveness of these products. For these reasons, FDA cautions pet-owners against the use of such products.

19. Can I give my pet marijuana products for medical purposes, such as to relieve the pain of a sick or dying pet?

A. Marijuana needs to be further studied to assess the safety and effectiveness for medical use in animals. To date, FDA has not approved marijuana for any use in animals (see **question and answer #4** above). If your pet is in pain, we urge you to talk with your veterinarian about appropriate treatment options.

20. I gave my pet marijuana and I'm concerned my pet is suffering adverse effects. What should I do?

A. Signs that your pet may be suffering adverse effects from ingesting marijuana may include lethargy, depression, heavy drooling, vomiting, agitation, tremors, and convulsions.

If you have concerns that your pet is suffering adverse effects from ingesting marijuana or any substance containing marijuana, consult your veterinarian, local animal emergency hospital or an animal poison control center immediately.

21. Has the agency received any adverse event reports associated with marijuana for animals?

A. While the agency is aware of reports of pets consuming various forms of marijuana, to date, FDA has not directly received any adverse event reports associated with giving marijuana to animals via our safety reporting portals. However, adverse events from accidental ingestion are well-documented in scientific literature. If you feel your animal has suffered from ingesting marijuana, we encourage you to report the adverse event to the FDA. Please

visit **Reporting Information about Animal Drugs and Devices (/AnimalVeterinary/SafetyHealth/ReportaProblem/ucm055305.htm#Drugs_and_Devices)** to learn more about how to report an adverse event related to an animal food or drug.

22. What is FDA doing about marijuana products currently on the market for pets?

A. FDA is currently collecting information about marijuana and marijuana-derived products being marketed for animals. FDA reminds consumers that these products have not been evaluated by FDA for safety and effectiveness, and we recommend that you talk with your veterinarian about appropriate treatment options for your pet.

23. What is the effect of section 7606 of the Agricultural Act of 2014 (sometimes known as the "industrial hemp" provision of the Farm Bill) on the FD&C Act?

A: As stated in the Statement of Principles on Industrial Hemp (81 FR 53395, Aug. 12, 2016), section 7606 did not amend the FD&C Act. For example, section 7606 did not alter the approval process for new drug applications, the requirements for the conduct of clinical or nonclinical research, the oversight of marketing claims, or any other authorities of the FDA as they are set forth in that Act. All products must comply with any relevant provisions of the FD&C Act.

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[4] Silva, et al. Prenatal tetrahydrocannabinol (THC) alters cognitive function and amphetamine response from weaning to adulthood in the rat. Neurotoxicol and Teratol 2012; 34(1): 63-71.
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[7] **http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Marijuana-Use-During-Pregnancy-and-Lactation (http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Marijuana-Use-During-Pregnancy-and-Lactation)**

Related Information

- **FDA and Marijuana (/NewsEvents/PublicHealthFocus/ucm421163.htm)**
- **Marijuana Research with Human Subjects (/NewsEvents/PublicHealthFocus/ucm421173.htm)**

More in Public Health Focus (/NewsEvents/PublicHealthFocus/default.htm)

Expanded Access (Compassionate Use) (/NewsEvents/PublicHealthFocus/ExpandedAccessCompassionateUse/default.htm)

Warning Letters and Test Results for Cannabidiol-Related Products

Over the past several years, FDA has issued several warning letters to firms that market unapproved new drugs that allegedly contain cannabidiol (CBD). As part of these actions, FDA has tested the chemical content of cannabinoid compounds in some of the products, and many were found to not contain the levels of CBD they claimed to contain. It is important to note that these products are not approved by FDA for the diagnosis, cure, mitigation, treatment, or prevention of any disease. Consumers should beware purchasing and using any such products.

2017 Warning Letters

Firm	State	Purchase Website
That's Natural! (/ICECI/EnforcementActions/WarningLetters/2017/ucm583197.htm)	CO	cbdoil.life
Stanley Brothers (/ICECI/EnforcementActions/WarningLetters/2017/ucm583192.htm)	CO	cwhemp.com
Natural Alchemist (/ICECI/EnforcementActions/WarningLetters/2017/ucm583205.htm)	NV	cbd-now.com
Green Roads Health (/ICECI/EnforcementActions/WarningLetters/2017/ucm583188.htm)	FL	greenroadshealth.com

2016 Warning Letters

2015 Warning Letters

Related Information

- FDA and Marijuana (/NewsEvents/PublicHealthFocus/ucm421163.htm)
- FDA and Marijuana: Questions and Answers (/NewsEvents/PublicHealthFocus/ucm421168.htm)

More in Public Health Focus (/NewsEvents/PublicHealthFocus/default.htm)

Expanded Access (Compassionate Use) (/NewsEvents/PublicHealthFocus/ExpandedAccessCompassionateUse/default.htm)

NATURAL PRODUCTS INSIDER®

REGULATORY

The Legality of CBD Oil in the United States: A 'High'ly Complex Issue

Supplement brands cannot answer the question "Is CBD legal?" with a simple yes or no answer. Several regulatory agencies have enacted rules and taken regulatory action, and Congress has passed legislation that muddles the issue.

Jonathan Manfre , Alan Feldstein | Mar 02, 2018

Cannabidiol (CBD) is one of the naturally occurring cannabinoids found in cannabis plants, which produce both marijuana and hemp, according to the World Health Organization (WHO). Hemp typically has a much lower concentration of

tetrahydrocannabinol (THC), the psychoactive chemical found in marijuana that produces a “high” when consumed. In fact, WHO reported that when consumed by humans, pure CBD does not exhibit the effects indicative of abuse, dependence potential or any public health-related problems.

If pure CBD does not produce a high or cause dependence in users, why is there a question about its legality? When it comes to the legal status of CBD, several areas of law must be examined. The answer to the question, “Is CBD legal?” is more complicated than a simple yes or no. It is so complicated that it would take more than the length of this article to fully explore all the issues. However, a review of the current legal and regulatory labyrinth of CBD can provide guidance.

The first consideration regarding the legal status of CBD is the Agricultural Act of 2014 (U.S. Farm Bill), which includes Section 7606, “Legitimacy of Industrial Hemp Research.” It allows universities and state departments to grow or cultivate industrial hemp if: “(1) the industrial hemp is grown or cultivated for purposes of research conducted under an agricultural pilot program or other agricultural or academic research; and (2) the growing or cultivating of industrial hemp is allowed under the laws of the state in which such institution of higher education or state department of agriculture is located and such research occurs.” The Farm Bill defines “industrial hemp” as “the plant *Cannabis Sativa L.* and any part of such plant, whether growing or not,” with a THC concentration of “not more than 0.3 percent on a dry weight basis.”

If the legal requirements of Section 7606 are met, then growing and cultivating industrial hemp is permitted. This law does not allow for the growing of marijuana, nor does it allow for anyone who wants to grow or cultivate industrial hemp to do so. One of the key requirements is that state law where the hemp is grown allows for it. Based on this guidance, it appears if a product is manufactured using CBD made from industrial hemp grown and cultivated according to the requirements of Section 7606 of the Farm Bill, it would be legal. However, DEA must also be considered.

On Dec. 14, 2016, DEA established a new drug code within Schedule I for "Marijuana Extract." The rule stated in part that CBD and other cannabinoids were included in the new drug code and as a result were Schedule I substances under the Controlled Substances Act (CSA). Marijuana is a Schedule I substance, along with drugs such as heroin, LSD and ecstasy. This new scheduling of Marijuana Extract is in direct conflict with the definition of industrial hemp in Section 7606 of the Farm Bill.

To address the conflict, on March 14, 2017, DEA issued a "Clarification of the New Drug Code (7350) for Marijuana Extract." DEA stated, "The new drug code (7350) established in the final rule does not include materials or products that are excluded from the definition of marijuana set forth in the Controlled Substances Act (CSA). The new drug code includes only those extracts that fall within the CSA definition of marijuana. If a product consisted solely of parts of the cannabis plant excluded from the CSA definition of marijuana, such product would not be included in the new drug code (7350) or in the drug code for marijuana (7360)." Therefore, DEA conceded CBD that comes from industrial hemp is legal so long as the industrial hemp is grown and cultivated legally pursuant to the requirements of the 2014 Farm Bill.

If industrial hemp, legal pursuant to the 2014 Farm Bill, is not a scheduled substance according to DEA, then are compliant products containing CBD legal? Unfortunately, other regulatory agencies are in the mix. Next up is FDA.

Within FDA's jurisdiction is the Dietary Supplement Health and Education Act of 1994 (DSHEA), which defines a dietary supplement as a product (other than tobacco) intended to supplement the diet that contains one or more "dietary ingredients." Botanicals are considered dietary ingredients. Dietary supplements are limited to products that: 1) are intended for ingestion in tablet, capsule, powder, softgel, gelcap, liquid or certain other forms; 2) are not represented as conventional food or as the sole item of a meal or of the diet; and 3) are labeled as dietary supplements. Because CBD is a botanical, products containing CBD that are intended to supplement the diet and are not the sole item of a meal or of the diet fall within the definition of a dietary supplement. As a result, companies that market

and sell CBD products must comply with the regulations for dietary supplements. These regulations include, but are not limited to, following cGMPs (current good manufacturing practices); labeling the products in accordance with 21 CFR 101.36; and not marketing the product to diagnose, treat, cure or prevent any disease state. Several companies that sell products containing CBD have received warning letters from FDA for making disease claims, such as the product having a positive effect on conditions such as cancer, anxiety, dementia and inflammation. FDA has also issued warning letters because certain products containing CBD had THC levels that exceeded the 0.3 percent allowed under the 2014 Farm Bill, and therefore, under the CSA.

Also under FDA's purview, according to 21 U.S.C. § 321(ff)(3)(B)(ii), by definition, a dietary supplement cannot include an article authorized for investigation as a new drug for which substantial, clinical investigations have been instituted and made public, if that article has not been marketed as a dietary supplement or as a food before the clinical investigations have been instituted. FDA has raised this issue in warning letters sent to companies marketing and selling CBD products. The Hemp Industry Association (HIA) disagreed with FDA's position, stating that CBD was marketed as a food and dietary supplement long before it was authorized for drug trials. HIA claimed it submitted evidence of this fact to FDA on a question and answer webpage, but FDA did not comment on this information or acknowledge receipt of the materials.

Even if CBD overcomes the hurdles of the Farm Bill, DEA concerns and FDA regulations, other regulatory bodies need to be considered. FTC reviews how products are marketed, including advertising and promotional materials. Further, each state may have its own laws, rules and regulations. All the regulatory bodies that may have authority over CBD are too numerous to cover here. One thing for certain is that the marketing of CBD is exploding. However, to do it 100 percent right, a supplement brand must ensure it has made all the regulators happy. Otherwise, it may be risking more problems than it is worth.

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Alan Feldstein, Esq., has over 30 years' experience in the area of advertising and marketing law, with most of those years devoted specifically to the health and dietary supplements industry. In addition to serving as attorney to many of the top names in sports nutrition in his capacity as Of Counsel to Collins Gann McCloskey & Barry PLLC, Feldstein has served as a professor of law on the Adjunct Faculty staff at Southwestern University School of Law teaching advertising and marketing law

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Health & Fitness Supplement News

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SARMs – The Final Countdown

by Jay Manfre

Consumers demand the most powerful and effective supplements to increase strength, energy, and performance. After ephedra was banned, companies searched for the next best stimulant product, and eventually DMAA (1,3-dimethylanamine) flooded the market. When anabolic steroids were officially listed as schedule III-controlled substances, chemists began formulating chemical compounds that would not "violate" the law. So began the "prohormone era" of the supplement world. Prohormones were marketed and sold as dietary supplements up until 2014 when President Obama signed the Designer Anabolic Steroid Control Act (DASCA). Although prohormones are illegal under DASCA, it has not stopped the search for comparable alternatives.

Enter SARMs - Selective Androgen Receptor Modulators. Although SARMs are often referred to as "new," they were discovered approximately twenty years ago. SARMs are non-steroidal compounds that selectively bind to androgen receptors in specific sites, such as skeletal muscle and bone. They have the ability to be more anabolic as opposed to more androgenic. This offers the potential for increased muscle growth while reducing the likelihood of undesirable side effects that can be caused by steroids – acne, prostate enlargement, hair growth in women, etc. Although there are many different SARMs being investigated by pharmaceutical companies, Ostarine®, a.k.a. MK-2866 and GTx-024, is the most well-known. It is currently being investigated by the pharmaceutical company GTx, Inc. as a treatment for women with Stress Urinary Incontinence.

It didn't take long for athletes and bodybuilders to begin using SARMs to build muscle and enhance performance. In 2008, the World Anti-Doping Agency (WADA) banned SARMs. Although banned by WADA, companies began selling SARMs as "Dietary Supplements." It is likely that dietary supplement companies saw SARMs as a potential "legal" way to fill the void left in the market after prohormones were banned. DASCA criminalizes the manufacture, sale, and possession of steroids and derivatives and slight variations on compounds that are listed. From a chemical standpoint SARMs are non-steroidal and they are not a derivative or variation of that structure. However, the Food and Drug Administration has publicly stated that SARMs are not dietary supplements.

The Dietary Supplement Health and Education Act (DSHEA) defines a dietary supplement as "a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or a concentrate metabolite, constituent, extract, or combination [thereof]." SARMs are not a vitamin, mineral, herb or other botanical, or amino acid. They are synthetic chemical compounds not found in nature or food. It is also not likely that SARMs are a "dietary substance for use by man to supplement the diet by increasing the total dietary intake."

Although SARMs do not fit the above definitions DSHEA also states that dietary supplements do not include "an article authorized for investigation as a new drug… for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public, which was not before such approval, certification, licensing, or authorization marketed as a dietary supplement or as a food..." Some SARMs are being investigated as new drugs by pharmaceutical companies and are currently undergoing clinical investigations that have been made public. FDA has pointed to this fact in several warning letters sent to companies that sell, or sold, SARMs as dietary supplements. FDA also states that SARMs are "prescription drugs" because they are not safe for use except under the supervision of a licensed practitioner.

Although FDA has opined that SARMs are not dietary supplements, SARMs are still being sold as "research chemicals" over the Internet. Whether or not the DEA will be able to effectively police this area of distribution remains to be seen. However, it is quite clear, if you are going to sell SARMs as an ingredient in -- or as -- a dietary supplement, expect a warning letter and possible legal action from FDA.

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[i] *https://www.govtrack.us/congress/bills/113/hr4771/text*
[ii] *Dalton, J; "Discovery of Nonsteroidal Androgens"; Biochemical and Biophysical Research Communications; Volume 244, Issue 1, 6 March 1998, Pages 1–4; Retrieved from http://www.sciencedirect.com/science/article/pii/S0006291X98982092*
[iii] *http://www.gtxinc.com/pipeline/*
[iv] *https://www.wada-ama.org/sites/default/files/prohibited_list_2018_en.pdf*
[v] *http://www.steroidlaw.com/2014/12/designer-anaboloic-steroid-control-act-signed-by-president-obama/*
[vi] *https://www.britannica.com/science/steroid*
[vii] *https://ods.od.nih.gov/About/DSHEA_Wording.aspx*
[vii] *https://ods.od.nih.gov/About/DSHEA_Wording.aspx*
[ix] *http://phx.corporate-ir.net/phoenix.zhtml?c=148196&p=irol-newsArticle&ID=2300266*
[x] *https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2017/ucm582464.htm*

CBD Enforcement Update

by cgmbesqsupcon in Enforcement Report

Cannabidiol (CBD) has received a lot of attention over the last several years. Consumers tout the numerous benefits of CBD and often refer to it as a "miracle" supplement. However, as explained in our article "The Legality of CBD Oil in the United States: A 'High'ly Complex Issue" published in Natural Products Insider on March 2, 2018, there is an intricate web of legal and regulatory issues surrounding its sale as a dietary supplement. In addition to some of the hurdles mentioned in the March 2 article, on June 25, 2018, the FDA announced the approval of Epidiolex (the oral CBD drug manufactured by GW Pharmaceuticals, Inc.) for the treatment of seizures associated with Lennox-Gastaut syndrome and Dravet syndrome. Now that CBD is approved as a prescription drug, we may possibly see increased enforcement against those companies marketing and selling CBD as a dietary supplement or food.

Without rehashing the regulatory issues addressed in the article published in Natural Products Insider, recently the FDA sent a warning letter to Signature Formulations, LLC (Signature) in part related to the company's CBD products. The warning letter, dated July 31, 2018, noted that the FDA inspected Signature's drug manufacturing facility from October 24 to November 9, 2017. The FDA's inspection resulted in a finding of "significant violations of current good manufacturing practice (CGMP) regulations for finished pharmaceuticals." Signature responded to the FDA's 483 (a 483 is issued at the conclusion of an inspection whereby the FDA lists the violations observed) on December 1, 2017. The July 31, 2018 warning letter explains that many of Signature's responses to the FDA's 483 were deficient and failed to set forth adequate corrective action procedures for addressing the CGMP violations.

Aside from the significant violations of CGMPs, the FDA took the opportunity in this warning letter to specifically address the company's manufacture and sale of products purporting to contain CBD. During the inspection, the FDA reviewed the product label for "CBD Muscle Gel." In addition, the FDA reviewed Signature's website, www.cbdtechcenter.com, where they market and take orders for the following products – CBD CreamLeaf Cream; CBD Muscle Gel; CBD Muscle Mist; Temporary Pain Relief Kit; CBD Oil 100mg, 250mg, 500mg, and 1000mg; CBD Oil Espresso flavor 100mg, 250mg, 500mg, and 1000mg; CBD Salve 50mg and 100mg; and CBD Toothpaste. FDA noted that some of these products were marketed and labeled as dietary supplements, while others were not.

Regarding the CBD products marketed and labeled as dietary supplements, the FDA began by stating, "The claims on your website establish that the products are drugs under section 201(g)(1) of the FD&C Act, 21 U.S.C. 321(g)(1), because they are intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease and because they are intended to affect the structure or any function of the body." The warning letter goes on to say that the FDA "has concluded based on available evidence that CBD products are excluded from the dietary supplement definition." The FDA's position has been well documented both on its website and in other warning letters. The FDA has repeatedly stated that CBD is excluded from the definition of a dietary supplement because CBD was not marketed as a dietary supplement or conventional food before CBD was authorized for substantial clinical investigations that were made public.

While this warning letter reiterates the FDA's position regarding CBD, it does provide some insight into the types of issues that lead to FDA enforcement against CBD. First, as noted in the FDA's warning letter,

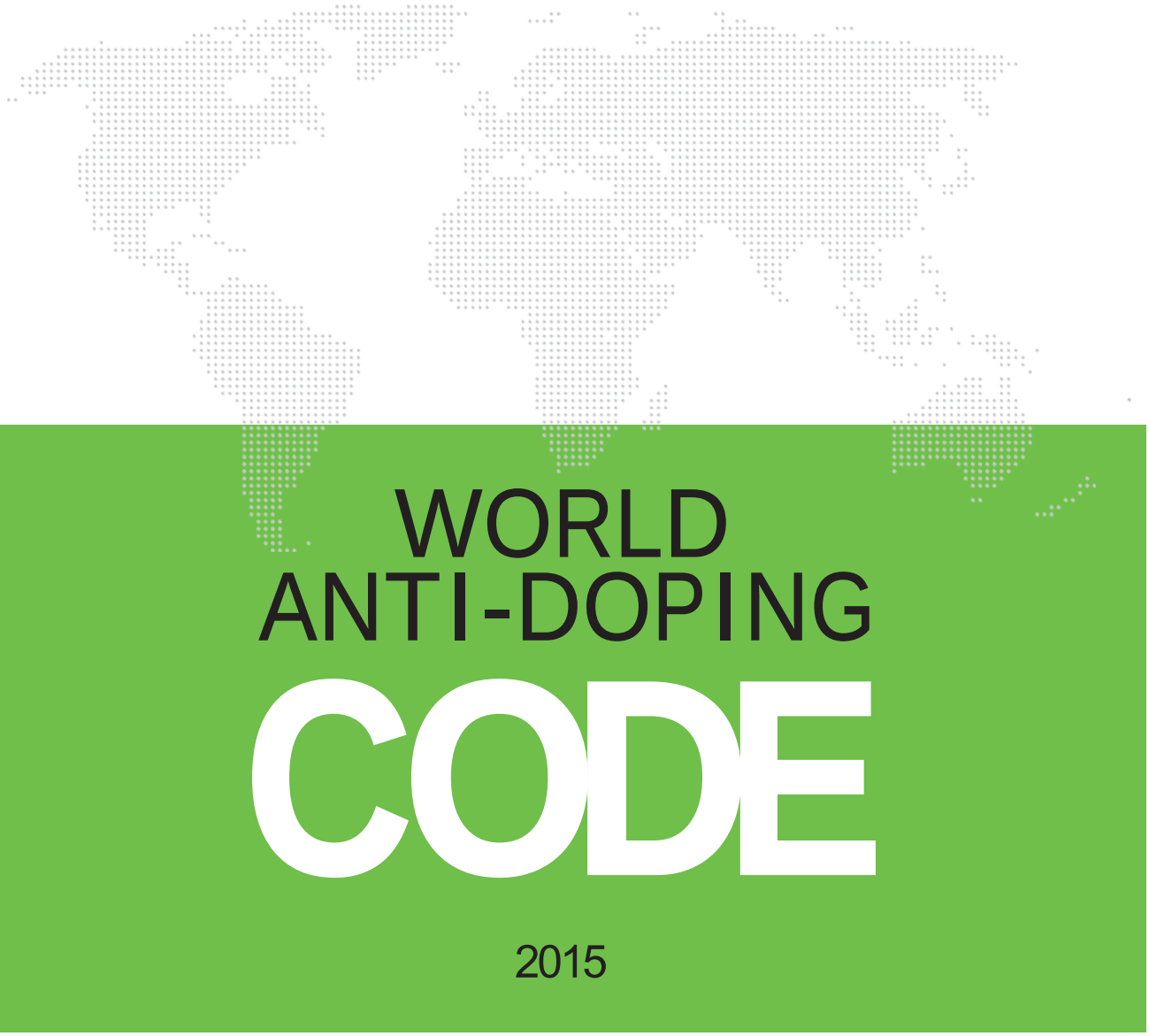
Signature had significant CGMP compliance issues. When a company is inspected by the FDA, it is vital that they respond to the FDA 483 letter in such a way that demonstrates the corrective actions that the company plans to take in order to address the FDA's concerns. Specifically, when it comes to compliance with CGMPs, the FDA is primarily concerned with consumer safety. Failure to provide an appropriate response will almost guarantee a warning letter. Second, dietary supplements cannot make any claims to diagnose, treat, cure, or prevent any disease. When companies make disease claims, either on the product label or websites, they are easy targets for an FDA warning letter. Disease claims cause dietary supplements to be regulated as misbranded drugs and/or unapproved new drugs.

So, what does this warning letter mean for companies that currently market and sell CBD as a dietary supplement? In short, from a regulatory standpoint, nothing new. The FDA has made its position against CBD as a dietary supplement clear. However, at this point we have not yet seen the FDA send out a warning letter to a company solely for selling CBD as a dietary supplement. Every warning letter related to CBD that we have seen so far has been coupled with the allegation that the company is also making disease claims, failing to follow CGMPs, or both. In some cases, we have also seen FDA warning letters address issues with THC being in the product in detectable amounts. In the future, is it possible that the FDA will target a company based solely on the fact that the product is, or contains, CBD? Sure, it's possible, as that is clearly FDA's position. But for now, making disease claims and/or failing to follow CGMPs puts companies at the highest risk of enforcement.

Jonathan (Jay) Manfre, Esq. – Jay is an associate attorney at Collins Gann McCloskey & Barry, PLLC and serves the day to day regulatory needs of its dietary supplement, sports nutrition, and conventional food clients. Jay has been extensively researching the regulatory and legal issues surrounding CBD and has become an expert in this complex area. If you have any questions regarding CBD please e-mail Jay at Jmanfre@supplementcounsel.com

In today's regulatory climate, where FDA, FTC, state attorneys general, industry self-regulatory organizations, class action lawyers, and even individual U.S. Senators are leading a patchwork of crusades against dietary supplement and cosmetics companies, it is vital to keep up to date with the latest enforcement efforts and trends. We regularly send out emails summarizing the latest enforcement actions (opt in; we never share our subscription list, and you can opt out at any time at the bottom of each email). Please share them! Learning from others' mistakes is cheaper than learning firsthand what kinds of practices and violations lead to enforcement.

If you have a dietary supplement or cosmetics company and have any questions about your responsibilities under the law, including label claims, labeling requirements, advertising review, CGMPs, or anything else, give us a call anytime at 516-294-0300 or e-mail us at info@supplementcounsel.com.



WORLD ANTI-DOPING CODE

2015

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World Anti-Doping Code

The World Anti-Doping Code was first adopted in 2003, took effect in 2004, and was then amended effective 1 January 2009. The following document incorporates revisions to the World Anti-Doping Code that were approved by the World Anti-Doping Agency Foundation Board in Johannesburg, South Africa on 15 November 2013. The revised 2015 World Anti-Doping Code is effective as of 1 January 2015.

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Table of Contents

PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE *CODE*

The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:

- To protect the *athletes*' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *athletes* worldwide, and
- To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.

The *Code*

The *Code* is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping elements.

it is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving consideration to the principles of proportionality and human rights.

[Comment: The Olympic Charter and the International Convention against Doping in Sport 2005 adopted in Paris on 19 October 2005 ("UNESCO Convention"), both recognize the prevention of and the fight against doping in sport as a critical part of the mission of the International Olympic Committee and UNESCO, and also recognize the fundamental role of the Code.]

The World Anti-Doping Program

The World Anti-Doping Program encompasses all of the elements needed in order to ensure optimal harmonization and best practice in international and national anti-doping programs. The main elements are:

Level 1: The *Code*

Level 2: *International Standards*

Level 3: Models of Best Practice and guidelines

International Standards

International Standards for different technical and operational areas within the anti-doping program have been and will be developed in consultation with the *Signatories* and governments and approved by *Wada*. The purpose of the *International Standards* is harmonization among *anti-doping organizations* responsible for specific technical and operational parts of anti-doping programs. Adherence to the *International Standards* is mandatory for compliance with the *Code*. The *International Standards* may be revised from time to time by the *Wada* Executive Committee after reasonable consultation with the *Signatories,* governments and other relevant stakeholders. *International Standards* and all revisions will be published on the *Wada* website and shall become effective on the date specified in the *International Standard* or revision.

[Comment: The International Standards contain much of the technical detail necessary for implementing the Code. International Standards will, in consultation with the Signatories, governments and other relevant stakeholders, be developed by experts and set forth in separate documents. It is important that the WADA Executive Committee be able to make timely changes to the International Standards without requiring any amendment of the Code.]

Models of Best Practice and Guidelines

Models of best practice and guidelines based on the *Code* and *International Standards* have been and will be developed to provide solutions in different areas of anti-doping. The models and guidelines will be recommended by *Wada* and made available to *Signatories* and other relevant stakeholders, but will not be mandatory. in addition to providing models of anti-doping documentation, *Wada* will also make some training assistance available to the *Signatories*.

[Comment: These model documents may provide alternatives from which stakeholders may select. Some stakeholders may choose to adopt the model rules and other models of best practices verbatim. Others may decide to adopt the models with modifications. Still other stakeholders may choose to develop their own rules consistent with the general principles and specific requirements set forth in the Code.

Model documents or guidelines for specific parts of anti-doping work have been developed and may continue to be developed based on generally recognized stakeholder needs and expectations.]

FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING CODE

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport." it is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person's natural talents. it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

- Ethics, fair play and honesty
- Health
- Excellence in performance
- Character and education
- Fun and joy
- Teamwork
- Dedication and commitment
- Respect for rules and laws
- Respect for self and other *Participants*
- Courage
- Community and solidarity

Doping is fundamentally contrary to the spirit of sport.

To fight doping by promoting the spirit of sport, the *Code* requires each *anti-doping organization* to develop and implement education and prevention programs for *athletes*, including youth, and *athlete Support Personnel*.

PART ONE
DOPING CONTROL

INTRODUCTION

Part One of the *Code* sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority, e.g., the international Olympic Committee, international Paralympic Committee, international Federations, *national olympic Committees* and Paralympic Committees, *Major event organizations*, and *national anti-doping organizations*. All such organizations are collectively referred to as *anti-doping organizations.*

All provisions of the *Code* are mandatory in substance and must be followed as applicable by each *anti-doping organization* and *athlete* or other *Person.* The *Code* does not, however, replace or eliminate the need for comprehensive anti-doping rules to be adopted by each *anti-doping organization*. While some provisions of the *Code* must be incorporated without substantive change by each *anti-doping organization* in its own anti-doping rules, other provisions of the *Code* establish mandatory guiding principles that allow flexibility in the formulation of rules by each *anti-doping organization* or establish requirements that must be followed by each *anti-doping organization* but need not be repeated in its own anti-doping rules.

Anti-doping rules, like competition rules, are sport rules governing the conditions under which sport is played. *athletes* or other *Persons* accept these rules as a condition of participation and shall be bound by these rules. Each *Signatory* shall establish rules and procedures to ensure that all *athletes* or other *Persons* under the authority of the *Signatory* and its member organizations are informed of and agree to be bound by anti-doping rules in force of the relevant *anti-doping organizations*.

Each *Signatory* shall establish rules and procedures to ensure that all *athletes* or other *Persons* under the authority of the *Signatory* and its member organizations consent to the dissemination of their private data as required or authorized by the *Code,* and are bound by and compliant with *Code* anti-doping rules, and that the appropriate *Consequences* are imposed on those *athletes* or other *Persons* who are not

in conformity with those rules. These sport-specific rules and procedures, aimed at enforcing anti-doping rules in a global and harmonized way, are distinct in nature from criminal and civil proceedings. They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the *Code* and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.

[Comment: Those Articles of the Code which must be incorporated into each Anti-Doping Organization's rules without substantive change are set forth in Article 23.2.2. For example, it is critical for purposes of harmonization that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations. These rules must be the same whether a hearing takes place before an International Federation, at the national level or before the Court of Arbitration for Sport.

Code provisions not listed in Article 23.2.2 are still mandatory in substance even though an Anti-Doping Organization is not required to incorporate them verbatim. Those provisions generally fall into two categories. First, some provisions direct Anti-Doping Organizations to take certain actions but there is no need to restate the provision in the Anti-Doping Organization's own anti-doping rules. For example, each Anti-Doping Organization must plan and conduct Testing as required by Article 5, but these directives to the Anti-Doping Organization need not be repeated in the Anti-Doping Organization's own rules. Second, some provisions are mandatory in substance but give each Anti-Doping Organization some flexibility in the implementation of the principles stated in the provision. As an example, it is not necessary for effective harmonization to force all Signatories to use one single results management and hearing process. At present, there are many different, yet equally effective processes for results management and hearings within different International Federations and different national bodies. The Code does not require absolute uniformity in results management and hearing procedures; it does, however, require that the diverse approaches of the Signatories satisfy principles stated in the Code.]

ARTICLE 1 DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of the *Code*.

ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

athletes or other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the *Prohibited list*.

The following constitute anti-doping rule violations:

2.1 Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*

2.1.1 it is each *athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *fault*, negligence or knowing *use* on the *athlete's* part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

[Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *athlete's* A *Sample* where the *athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed; or, where the *athlete's* B *Sample* is analyzed and the analysis of the *athlete's* B *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *athlete's* A *Sample;* or, where the *athlete's* B *Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the *Prohibited list*, the presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *athlete's Sample* shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the *Prohibited list* or *International Standards* may establish special criteria for the evaluation of *Prohibited Substances* that can also be produced endogenously.

[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.]

2.2 *Use* or *Attempted Use* by an *Athlete* of a *Prohibited Substance* or a *Prohibited Method*

2.2.1 it is each *athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body and that no *Prohibited Method* is *used*. Accordingly, it is not necessary that intent, *fault*, negligence or knowing *use* on the *athlete's* part be demonstrated in order to establish an anti-doping rule violation for *use* of a *Prohibited Substance* or a *Prohibited Method*.

2.2.2 The success or failure of the *use* or *attempted use* of a *Prohibited Substance* or *Prohibited Method* is not material. it is sufficient that the *Prohibited Substance* or *Prohibited Method* was *used* or *attempted* to be *used* for an anti-doping rule violation to be committed.

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1.

For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

[Comment to Article 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance or a Prohibited Method requires proof of intent on the Athlete's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method.

An Athlete's Use of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of Article 2.1 regardless of when that substance might have been administered.)]

2.3 Evading, Refusing or Failing to Submit to *Sample* Collection

Evading *Sample* collection, or without compelling justification, refusing or failing to submit to *Sample* collection after notification as authorized in applicable anti-doping rules.

2.4 Whereabouts Failures

Any combination of three missed tests and/or filing failures, as defined in the international Standard for Testing and investigations, within a twelve-month period by an *athlete* in a *registered testing Pool*.

2.5 *Tampering* or *Attempted Tampering* with any part of *Doping Control*

Conduct which subverts the *doping Control* process but which would not otherwise be included in the definition of *Prohibited Methods*. *tampering* shall include, without limitation, intentionally interfering or attempting to interfere with a *doping Control* official, providing fraudulent information to an *anti-doping organization* or intimidating or attempting to intimidate a potential witness.

[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]

[Comment to Article 2.5: For example, this Article would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, or altering a Sample by the addition of a foreign substance. Offensive conduct towards a Doping Control official or other Person involved in Doping Control which does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organizations.]

2.6 *Possession* of a *Prohibited Substance* or a *Prohibited Method*

2.6.1 *Possession* by an *athlete In-Competition* of any *Prohibited Substance* or any *Prohibited Method,* or *Possession* by an *athlete out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *out-of-Competition* unless the *athlete* establishes that the *Possession* is consistent with a Therapeutic Use Exemption *("tue")* granted in accordance with Article 4.4 or other acceptable justification.

2.6.2 *Possession* by an *athlete Support Person In-Competition* of any *Prohibited Substance* or any *Prohibited Method,* or *Possession* by an *athlete Support Person out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *out-of-Competition* in connection with an *athlete*, *Competition* or training, unless the *athlete Support Person* establishes that the *Possession* is consistent with a *tue* granted to an *athlete* in accordance with Article 4.4 or other acceptable justification.

2.7 *Trafficking* or *Attempted Trafficking* in any *Prohibited Substance* or *Prohibited Method*

[Comment to Articles 2.6.1 and 2.6.2: Acceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child.]

[Comment to Article 2.6.2: Acceptable justification would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations.]

2.8 *Administration* or *Attempted Administration* to any *Athlete In-Competition* of any *Prohibited Substance* or *Prohibited Method,* or *Administration* or *Attempted Administration* to any *Athlete Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* that is prohibited *Out-of-Competition*

2.9 Complicity

Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, *attempted* anti-doping rule violation or violation of Article 10.12.1 by another *Person*.

2.10 Prohibited Association

Association by an *athlete* or other *Person* subject to the authority of an *anti-doping organization* in a professional or sport-related capacity with any *athlete Support Person* who:

2.10.1 If subject to the authority of an *anti-doping organization*, is serving a period of *Ineligibility*; or

2.10.2 If not subject to the authority of an *anti-doping organization*, and where *Ineligibility* has not been addressed in a results management process pursuant to the *Code*, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*. The disqualifying status of such *Person* shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed; or

2.10.3 is serving as a front or intermediary for an individual described in Article 2.10.1 or 2.10.2.

in order for this provision to apply, it is necessary that the *athlete* or other *Person* has previously been advised in writing by an *anti-doping organization* with jurisdiction over the *athlete* or other *Person*, or by *Wada*, of the *athlete Support Person's* disqualifying status and the potential *Consequence* of prohibited association and that the *athlete* or other *Person* can reasonably avoid the association. The *anti-doping organization* shall also use reasonable efforts to advise the *athlete Support Person* who is the subject of the notice to the *athlete* or other *Person* that the *athlete Support Person* may, within 15 days, come forward to the *anti-doping organization* to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her. (Notwithstanding Article 17, this Article applies even when the *athlete Support Person's* disqualifying conduct occurred prior to the effective date provided in Article 25.)

The burden shall be on the *athlete* or other *Person* to establish that any association with *athlete Support Personnel* described in Article 2.10.1 or 2.10.2 is not in a professional or sport-related capacity.

anti-doping organizations that are aware of *athlete Support Personnel* who meet the criteria described in Article 2.10.1, 2.10.2, or 2.10.3 shall submit that information to *Wada*.

[Comment to Article 2.10: Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Person to serve as an agent or representative. Prohibited association need not involve any form of compensation.]

ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

The *anti-doping organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *anti-doping organization* has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the *Code* places the burden of proof upon the *athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

3.2.1 Analytical methods or decision limits approved by *Wada* after consultation within the relevant scientific community and which have been

[Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

[Comment to Article 3.2: For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport.]

the subject of peer review are presumed to be scientifically valid. Any *athlete* or other *Person* seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify *Wada* of the challenge and the basis of the challenge. *CaS,* on its own initiative, may also inform *Wada* of any such challenge. At *Wada's* request, the *CaS* panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of *Wada's* receipt of such notice, and *Wada's* receipt of the *CaS* file, *Wada* shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding.

3.2.2 *Wada*-accredited laboratories, and other laboratories approved by *Wada*, are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the international Standard for Laboratories. The *athlete* or other *Person* may rebut this presumption by establishing that a departure from the international Standard for Laboratories occurred which could reasonably have caused the *adverse analytical finding*.

if the *athlete* or other *Person* rebuts the preceding presumption by showing that a departure from the international Standard for Laboratories occurred which could reasonably have caused the *adverse analytical finding*, then the *anti-doping organization* shall have the burden to establish that such departure did not cause the *adverse analytical finding*.

[Comment to Article 3.2.2: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person does so, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other *International Standard* or other anti-doping rule or policy set forth in the *Code* or *anti-doping organization* rules which did not cause an *adverse analytical finding* or other anti-doping rule violation shall not invalidate such evidence or results. if the *athlete* or other *Person* establishes a departure from another *International Standard* or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an *adverse analytical finding* or other anti-doping rule violation, then the *anti-doping organization* shall have the burden to establish that such departure did not cause the *adverse analytical finding* or the factual basis for the anti-doping rule violation.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the *athlete* or other *Person* to whom the decision pertained of those facts unless the *athlete* or other *Person* establishes that the decision violated principles of natural justice.

3.2.5 The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the *athlete* or other *Person* who is asserted to have committed an anti-doping rule violation based on the *athlete's* or other *Person's* refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the *anti-doping organization* asserting the anti-doping rule violation.

ARTICLE 4 THE *PROHIBITED LIST*

4.1 Publication and Revision of the *Prohibited List*

Wada shall, as often as necessary and no less often than annually, publish the *Prohibited list* as an *International Standard*. The proposed content of the *Prohibited list* and all revisions shall be provided in writing promptly to all *Signatories* and governments for comment and consultation. Each annual version of the *Prohibited list* and all revisions shall be distributed promptly by *Wada* to each *Signatory*, *Wada*-accredited or approved laboratory, and government, and shall be published on *Wada's* website, and each *Signatory* shall take appropriate steps to distribute the *Prohibited list* to its members and constituents. The rules of each *anti-doping organization* shall specify that, unless provided otherwise in the *Prohibited list* or a revision, the *Prohibited list* and revisions shall go into effect under the *anti-doping organization's* rules three months after publication of the *Prohibited list* by *Wada* without requiring any further action by the *anti-doping organization.*

4.2 *Prohibited Substances* and *Prohibited Methods* Identified on the *Prohibited List*

4.2.1 *Prohibited Substances* and *Prohibited Methods*

The *Prohibited list* shall identify those *Prohibited Substances* and *Prohibited Methods* which are prohibited as doping at all times (both *In-Competition* and *out-of-Competition*) because of their potential to enhance performance in future *Competitions* or their masking potential,

[Comment to Article 4.1: The Prohibited List will be revised and published on an expedited basis whenever the need arises. However, for the sake of predictability, a new Prohibited List will be published every year whether or not changes have been made. WADA will always have the most current Prohibited List published on its website. The Prohibited List is an integral part of the International Convention against Doping in Sport. WADA will inform the Director-General of UNESCO of any change to the Prohibited List.]

and those substances and methods which are prohibited *In-Competition* only. The *Prohibited list* may be expanded by *Wada* for a particular sport. *Prohibited Substances* and *Prohibited Methods* may be included in the *Prohibited list* by general category (e.g., anabolic agents) or by specific reference to a particular substance or method.

4.2.2 *Specified Substances*

For purposes of the application of Article 10, all *Prohibited Substances* shall be *Specified Substances* except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the *Prohibited list*. The category of *Specified Substances* shall not include *Prohibited Methods*.

4.2.3 New Classes of *Prohibited Substances*

in the event *Wada* expands the *Prohibited list* by adding a new class of *Prohibited Substances* in accordance with Article 4.1, *Wada's* Executive Committee shall determine whether any or all *Prohibited Substances* within the new class of *Prohibited Substances* shall be considered *Specified Substances* under Article 4.2.2.

[Comment to Article 4.2.1: Out-of-Competition Use of a substance which is only prohibited In-Competition is not an anti-doping rule violation unless an Adverse Analytical Finding for the substance or its Metabolites or Markers is reported for a Sample collected In-Competition.]

[Comment to Article 4.2.2: The Specified Substances identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance.]

4.3 Criteria for Including Substances and Methods on the *Prohibited List*

Wada shall consider the following criteria in deciding whether to include a substance or method on the *Prohibited list*:

4.3.1 A substance or method shall be considered for inclusion on the *Prohibited list* if *Wada*, in its sole discretion, determines that the substance or method meets any two of the following three criteria:

4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;

4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the *use* of the substance or method represents an actual or potential health risk to the *athlete*;

4.3.1.3 *Wada's* determination that the *use* of the substance or method violates the spirit of sport described in the introduction to the *Code*.

4.3.2 A substance or method shall also be included on the *Prohibited list* if *Wada* determines there is medical or other scientific evidence, pharmacological effect or experience that

[Comment to Article 4.3.1.1: This Article anticipates that there may be substances that, when used alone, are not prohibited but which will be prohibited if used in combination with certain other substances. A substance which is added to the Prohibited List because it has the potential to enhance performance only in combination with another substance shall be so noted and shall be prohibited only if there is evidence relating to both substances in combination.]

the substance or method has the potential to mask the *use* of other *Prohibited Substances* or *Prohibited Methods*.

4.3.3 *Wada's* determination of the *Prohibited Substances* and *Prohibited Methods* that will be included on the *Prohibited list,* the classification of substances into categories on the *Prohibited list,* and the classification of a substance as prohibited at all times or *In-Competition* only, is final and shall not be subject to challenge by an *athlete* or other *Person* based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

4.4 Therapeutic Use Exemptions *("TUEs")*

4.4.1 The presence of a *Prohibited Substance* or its *Metabolites* or *Markers*, and/or the *use* or *attempted use*, *Possession* or *administration* or *attempted administration* of a *Prohibited Substance* or *Prohibited Method* shall not be considered an anti-doping rule violation if it is consistent with the provisions of a *tue* granted in accordance with the international Standard for Therapeutic Use Exemptions.

4.4.2 An *athlete* who is not an *International-level athlete* should apply to his or her *national anti-doping organization* for a *tue*. if the *national anti-doping organization* denies the application, the *athlete* may appeal exclusively to the national-level appeal body described in Articles 13.2.2 and 13.2.3.

[Comment to Article 4.3.2: As part of the process each year, all Signatories, governments and other interested Persons are invited to provide comments to WADA on the content of the Prohibited List.]

4.4.3 An *athlete* who is an *International-level athlete* should apply to his or her international Federation.

4.4.3.1 Where the *athlete* already has a *tue* granted by his or her *national anti-doping organization* for the substance or method in question, if that *tue* meets the criteria set out in the international Standard for Therapeutic Use Exemptions, then the international Federation must recognize it. If the international Federation considers that the *tue* does not meet those criteria and so refuses to recognize it, it must notify the *athlete* and his or her *national anti-doping organization* promptly, with reasons. The *athlete* or the *national anti-doping organization* shall have 21 days from such notification to refer the matter to *Wada* for review. if the matter is referred to *Wada* for review, the *tue* granted by the *national anti-doping organization* remains valid for national-level *Competition* and *out-of-Competition testing* (but is not valid for international-level *Competition*) pending *Wada's* decision. if the matter is not referred to *Wada* for review, the *tue* becomes invalid for any purpose when the 21-day review deadline expires.

4.4.3.2 if the *athlete* does not already have a *tue* granted by his or her *national*

[Comment to Article 4.4.3: If the International Federation refuses to recognize a TUE granted by a National Anti-Doping Organization only because medical records or other information are missing that are needed to demonstrate satisfaction with the criteria in the International Standard for Therapeutic Use Exemptions, the matter should not be referred to WADA. Instead, the file should be completed and re-submitted to the International Federation.

If an International Federation chooses to test an Athlete who is not an International-Level Athlete, it must recognize a TUE granted to that Athlete by his or her National Anti-Doping Organization.]

anti-doping organization for the substance or method in question, the *athlete* must apply directly to his or her international Federation for a *tue* as soon as the need arises. if the international Federation (or the *national anti-doping organization*, where it has agreed to consider the application on behalf of the international Federation) denies the *athlete's* application, it must notify the *athlete* promptly, with reasons. if the international Federation grants the *athlete's* application, it must notify not only the *athlete* but also his or her *national anti-doping organization*, and if the *national anti-doping organization* considers that the *tue* does not meet the criteria set out in the international Standard for Therapeutic Use Exemptions, it has 21 days from such notification to refer the matter to *Wada* for review. if the *national anti-doping organization* refers the matter to *Wada* for review, the *tue* granted by the international Federation remains valid for international-level *Competition* and *out-of-Competition testing* (but is not valid for national-level *Competition*) pending *Wada's* decision. if the *national anti-doping organization* does not refer the matter to *Wada* for review, the *tue* granted by the international Federation becomes valid for national-level *Competition* as well when the 21-day review deadline expires.

4.4.4 A *Major event organization* may require *athletes* to apply to it for a *tue* if they wish to *use* a *Prohibited Substance* or a *Prohibited Method* in connection with the *event*. in that case:

4.4.4.1 The *Major event organization* must ensure a process is available for an *athlete* to apply for a *tue* if he or she does not already have one. if the *tue* is granted, it is effective for its *event* only.

4.4.4.2 Where the *athlete* already has a *tue* granted by his or her *national anti-doping organization* or international Federation, if that *tue* meets the criteria set out in the international Standard for Therapeutic Use Exemptions, the *Major event organization* must recognize it. If the *Major event organization* decides the *tue* does not meet those criteria and so refuses to recognize it, it must notify the *athlete* promptly, explaining its reasons.

4.4.4.3 A decision by a *Major event organization* not to recognize or not to grant a *tue* may be appealed by the *athlete* exclusively to an independent body established or appointed by the *Major event organization* for that purpose. if the *athlete* does not appeal (or the appeal is unsuccessful), he or she may not *use* the substance or method in question in connection with the *event*, but any *tue* granted by his or her *national anti-doping organization* or international Federation for that substance or method remains valid outside of that *event*.

[Comment to Article 4.4.4.3: For example, the CAS Ad Hoc Division or a similar body may act as the independent appeal body for particular Events, or WADA may agree to perform that function. If neither CAS nor WADA are performing that function, WADA retains the right (but not the obligation) to review the TUE decisions made in connection with the Event at any time, in accordance with Article 4.4.6.]

4.4.5 if an *anti-doping organization* chooses to collect a *Sample* from a *Person* who is not an *International-level* or *national-level athlete*, and that *Person* is *using* a *Prohibited Substance* or *Prohibited Method* for therapeutic reasons, the *anti-doping organization* may permit him or her to apply for a retroactive *tue*.

4.4.6 *Wada* must review an international Federation's decision not to recognize a *tue* granted by the *national anti-doping organization* that is referred to it by the *athlete* or the *athlete's national anti-doping organization.* in addition, *Wada* must review an international Federation's decision to grant a *tue* that is referred to it by the *athlete's national anti-doping organization*. *Wada* may review any other *tue* decisions at any time, whether upon request by those affected or on its own initiative. if the *tue* decision being reviewed meets the criteria set out in the international Standard for Therapeutic Use Exemptions, *Wada* will not interfere with it. if the *tue* decision does not meet those criteria, *Wada* will reverse it.

4.4.7 Any *tue* decision by an international Federation (or by a *national anti-doping organization* where it has agreed to consider the application on behalf of an international Federation) that is not reviewed by *Wada*, or that is reviewed by *Wada* but is not reversed upon review, may be appealed by the *athlete* and/or the *athlete's national anti-doping organization,* exclusively to *CaS*.

[Comment to Article 4.4.6: WADA shall be entitled to charge a fee to cover the costs of (a) any review it is required to conduct in accordance with Article 4.4.6; and (b) any review it chooses to conduct, where the decision being reviewed is reversed.]

[Comment to Article 4.4.7: In such cases, the decision being appealed is the International Federation's TUE decision, not WADA's decision not to review the TUE decision or (having reviewed it) not to reverse the TUE decision. However, the time to appeal the TUE decision does not begin to run until the date that WADA communicates its decision. In any event, whether the decision has been reviewed by WADA or not, WADA shall be given notice of the appeal so that it may participate if it sees fit.]

4.4.8 A decision by *Wada* to reverse a *tue* decision may be appealed by the *athlete,* the *national anti-doping organization* and/or the international Federation affected, exclusively to *CaS*.

4.4.9 A failure to take action within a reasonable time on a properly submitted application for grant/recognition of a *tue* or for review of a *tue* decision shall be considered a denial of the application.

4.5 Monitoring Program

Wada, in consultation with *Signatories* and governments, shall establish a monitoring program regarding substances which are not on the *Prohibited list*, but which *Wada* wishes to monitor in order to detect patterns of misuse in sport. *Wada* shall publish, in advance of any *testing*, the substances that will be monitored. Laboratories will report the instances of reported *use* or detected presence of these substances to *Wada* periodically on an aggregate basis by sport and whether the *Samples* were collected *In-Competition* or *out–of-Competition*. Such reports shall not contain additional information regarding specific *Samples*. *Wada* shall make available to international Federations and *national anti-doping organizations*, on at least an annual basis, aggregate statistical information by sport regarding the additional substances. *Wada* shall implement measures to ensure that strict anonymity of individual *athletes* is maintained with respect to such reports. The reported *use* or detected presence of a monitored substance shall not constitute an anti-doping rule violation.

ARTICLE 5 *TESTING* AND INVESTIGATIONS

5.1 Purpose of *Testing* and Investigations

testing and investigations shall only be undertaken for anti-doping purposes.

5.1.1 *testing* shall be undertaken to obtain analytical evidence as to the *athlete's* compliance (or non-compliance) with the strict *Code* prohibition on the presence/*use* of a *Prohibited Substance* or *Prohibited Method*.

5.1.2 investigations shall be undertaken:

(a) in relation to *atypical findings* and *adverse Passport findings*, in accordance with Articles 7.4 and 7.5 respectively, gathering intelligence or evidence (including, in particular, analytical evidence) in order to determine whether an anti-doping rule violation has occurred under Article 2.1 and/or Article 2.2; and

(b) in relation to other indications of potential anti-doping rule violations, in accordance with Articles 7.6 and 7.7, gathering intelligence or evidence (including, in particular, non-analytical evidence) in order to determine whether an anti-doping rule violation has occurred under any of Articles 2.2 to 2.10.

5.2 Scope of *Testing*

Any *athlete* may be required to provide a *Sample* at any time and at any place by any *anti-doping organization* with *testing* authority over him or her. Subject to the jurisdictional limitations for *event testing* set out in Article 5.3:

5.2.1 Each *national anti-doping organization* shall have *In-Competition* and *out-of-Competition testing* authority over all *athletes* who are nationals, residents, license-holders or members of sport organizations of that country or who are present in that *national anti-doping organization's* country.

5.2.2 Each international Federation shall have *In-Competition* and *out-of-Competition testing* authority over all *athletes* who are subject to its rules, including those who participate in *International events* or who participate in *events* governed by the rules of that international

Federation, or who are members or license-holders of that international Federation or its member National Federations, or their members.

5.2.3 Each *Major event organization,* including the international Olympic Committee and the international Paralympic Committee, shall have *In-Competition testing* authority for its *events* and *out-of-Competition testing* authority over all *athletes* entered in one of its future *events* or who have otherwise been made subject to the *testing* authority of the *Major event organization* for a future *event*.

5.2.4 *Wada* shall have *In-Competition and out-of-Competition testing* authority as set out in Article 20.

5.2.5 *anti-doping organizations* may test any *athlete* over whom they have *testing* authority who has not retired, including *athletes* serving a period of *Ineligibility.*

5.2.6 if an international Federation or *Major event organization* delegates or contracts any part of *testing* to a *national anti-doping organization* (directly or through a National Federation), that *national anti-doping organization* may collect additional *Samples* or direct the laboratory to perform additional types of analysis at the *national anti-doping organization's* expense. if additional *Samples* are collected or additional types of analysis are performed, the international Federation or *Major event organization* shall be notified.

[Comment to Article 5.2: Additional authority to conduct Testing may be conferred by means of bilateral or multilateral agreements among Signatories. Unless the Athlete has identified a 60-minute Testing window during the following-described time period, or otherwise consented to Testing during that period, before Testing an Athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organization should have serious and specific suspicion that the Athlete may be engaged in doping. A challenge to whether an Anti-Doping Organization had sufficient suspicion for Testing during this time period shall not be a defense to an anti-doping rule violation based on such test or attempted test.]

5.3 *Event Testing*

5.3.1 Except as otherwise provided below, only a single organization should be responsible for initiating and directing *testing* at *event venues* during an *event Period.* At *International events,* the collection of *Samples* shall be initiated and directed by the international organization which is the ruling body for the *event* (e.g., the international Olympic Committee for the Olympic games, the international Federation for a World Championship, and the Pan-American Sports Organization for the Pan American Games). At *national events,* the collection of *Samples* shall be initiated and directed by the *national anti-doping organization* of that country. At the request of the ruling body for an *event*, any *testing* during the *event Period* outside of the *event venues* shall be coordinated with that ruling body.

5.3.2 if an *anti-doping organization* which would otherwise have *testing* authority but is not responsible for initiating and directing *testing* at an *event* desires to conduct *testing* of *athletes* at the *event venues* during the *event Period,* the *anti-doping organization* shall first confer with the ruling body of the *event* to obtain permission to conduct and coordinate such *testing.* if the *anti-doping organization* is not satisfied with the response from the ruling body of the *event,* the *anti-doping organization* may, in accordance with procedures published by *Wada,* ask *Wada* for permission to conduct *testing* and to determine how to coordinate such *testing. Wada* shall not grant approval for such *testing* before consulting with and informing the ruling body for the *event*.

[Comment to Article 5.3.1: Some ruling bodies for International Events may be doing their own Testing outside of the Event Venues during the Event Period and thus want to coordinate that Testing with National Anti-Doping Organization Testing.]

Wada's decision shall be final and not subject to appeal. Unless otherwise provided in the authorization to conduct *testing*, such tests shall be considered *out-of-Competition* tests. Results management for any such test shall be the responsibility of the *anti-doping organization* initiating the test unless provided otherwise in the rules of the ruling body of the *event*.

5.4 Test Distribution Planning

5.4.1 *Wada,* in consultation with international Federations and other *anti-doping organizations*, will adopt a Technical Document under the international Standard for Testing and investigations that establishes by means of a risk assessment which *Prohibited Substances* and/or *Prohibited Methods* are most likely to be abused in particular sports and sport disciplines.

5.4.2 Starting with that risk assessment, each *anti-doping organization* with *testing* authority shall develop and implement an effective, intelligent and proportionate test distribution plan that prioritizes appropriately between disciplines, categories of *athletes*, types of *testing*, types of *Samples* collected, and types of *Sample* analysis, all in compliance with the requirements of the international Standard for Testing and investigations. Each *anti-doping organization* shall provide *Wada* upon request with a copy of its current test distribution plan.

[Comment to Article 5.3.2: Before giving approval to a National Anti-Doping Organization to initiate and conduct Testing at an International Event, WADA shall consult with the international organization which is the ruling body for the Event. Before giving approval to an International Federation to initiate and conduct Testing at a National Event, WADA shall consult with the National Anti-Doping Organization of the country where the Event takes place. The Anti-Doping Organization "initiating and directing Testing" may, if it chooses, enter into agreements with other organizations to which it delegates responsibility for Sample collection or other aspects of the Doping Control process.]

5.4.3 Where reasonably feasible, *testing* shall be coordinated through *adaMS* or another system approved by *Wada*, in order to maximize the effectiveness of the combined *testing* effort and to avoid unnecessary repetitive *testing*.

5.5 *Testing* Requirements

All *testing* shall be conducted in conformity with the international Standard for Testing and investigations.

5.6 *Athlete* Whereabouts Information

athletes who have been included in a *registered testing Pool* by their international Federation and/or *national anti-doping organization* shall provide whereabouts information in the manner specified in the international Standard for Testing and investigations. The international Federations and *national anti-doping organizations* shall coordinate the identification of such *athletes* and the collection of their whereabouts information. Each international Federation and *national anti-doping organization* shall make available, through *adaMS* or another system approved by *Wada,* a list which identifies those *athletes* included in its *registered testing Pool* either by name or by clearly defined, specific criteria. *athletes* shall be notified before they are included in a *registered testing Pool* and when they are removed from that pool. The whereabouts information they provide while in the *registered testing Pool* will be accessible, through *adaMS* or another system approved by *Wada*, to *Wada* and to other *anti-doping organizations* having authority to test the *athlete* as provided in Article 5.2. This information shall be maintained in strict confidence at all times; shall be used exclusively for purposes of planning, coordinating or conducting *doping Control,* providing information relevant to the *athlete biological Passport* or other analytical results, to support an investigation into a potential anti-doping rule violation, or to support proceedings alleging an anti-doping rule violation; and shall be destroyed after it is no longer relevant for these purposes in accordance with the international Standard for the Protection of Privacy and Personal information.

5.7 Retired *Athletes* Returning to *Competition*

5.7.1 if an *International- or national-level athlete* in a *registered testing Pool* retires and then wishes to return to active participation in sport, the *athlete* shall not compete in *International events* or *national events* until the *athlete* has made himself or herself available for *testing*, by giving six months prior written notice to his or her international Federation and *national anti-doping organization*. *Wada*, in consultation with the relevant international Federation and *national anti-doping organization*, may grant an exemption to the six-month written notice rule where the strict application of that rule would be manifestly unfair to an *athlete*. This decision may be appealed under Article 13.

5.7.1.1 Any competitive results obtained in violation of Article 5.7.1 shall be *disqualified*.

5.7.2 if an *athlete* retires from sport while subject to a period of *Ineligibility* and then wishes to return to active competition in sport, the *athlete* shall not compete in *International events* or *national events* until the *athlete* has made himself or herself available for *testing* by giving six months prior written notice (or notice equivalent to the period of *Ineligibility* remaining as of the date the *athlete* retired, if that period was longer than six months) to his or her international Federation and *national anti-doping organization*.

5.8 Investigations and Intelligence Gathering

anti-doping organizations shall ensure they are able to do each of the following, as applicable and in accordance with the international Standard for Testing and investigations:

5.8.1 Obtain, assess and process anti-doping intelligence from all available sources to inform

the development of an effective, intelligent and proportionate test distribution plan, to plan *target testing*, and/or to form the basis of an investigation into a possible anti-doping rule violation(s); and

5.8.2 investigate *atypical findings* and *adverse Passport findings*, in accordance with Articles 7.4 and 7.5 respectively; and

5.8.3 investigate any other analytical or non-analytical information or intelligence that indicates a possible anti-doping rule violation(s), in accordance with Articles 7.6 and 7.7, in order either to rule out the possible violation or to develop evidence that would support the initiation of an anti-doping rule violation proceeding.

ARTICLE 6 ANALYSIS OF *SAMPLES*

Samples shall be analyzed in accordance with the following principles:

6.1 Use of Accredited and Approved Laboratories

For purposes of Article 2.1, *Samples* shall be analyzed only in *Wada*-accredited laboratories or laboratories otherwise approved by *Wada*. The choice of the *Wada*-accredited or *Wada*-approved laboratory used for the *Sample* analysis shall be determined exclusively by the *anti-doping organization* responsible for results management.

[Comment to Article 6.1: For cost and geographic access reasons, WADA may approve laboratories which are not WADA-accredited to perform particular analyses, for example, analysis of blood which should be delivered from the collection site to the laboratory within a set deadline. Before approving any such laboratory, WADA will ensure it meets the high analytical and custodial standards required by WADA. Violations of Article 2.1 may be established only by Sample analysis performed by a WADA-accredited laboratory or another laboratory approved by WADA. Violations of other Articles may be established using analytical results from other laboratories so long as the results are reliable.]

6.2 Purpose of Analysis of *Samples*

Samples shall be analyzed to detect *Prohibited Substances* and *Prohibited Methods* identified on the *Prohibited list* and other substances as may be directed by *Wada* pursuant to Article 4.5, or to assist an *anti-doping organization* in profiling relevant parameters in an *athlete's* urine, blood or other matrix, including DNA or genomic profiling, or for any other legitimate anti-doping purpose. *Samples* may be collected and stored for future analysis.

6.3 Research on *Samples*

No *Sample* may be used for research without the *athlete's* written consent. *Samples* used for purposes other than Article 6.2 shall have any means of identification removed such that they cannot be traced back to a particular *athlete*.

6.4 Standards for *Sample* Analysis and Reporting

Laboratories shall analyze *Samples* and report results in conformity with the international Standard for Laboratories. To ensure effective *testing*, the Technical Document referenced at Article 5.4.1 will establish risk assessment-based *Sample* analysis menus appropriate for particular sports and sport disciplines, and laboratories shall analyze *Samples* in conformity with those menus, except as follows:

6.4.1 *anti-doping organizations* may request that laboratories analyze their *Samples* using more extensive menus than those described in the Technical Document.

[Comment to Article 6.2: For example, relevant profile information could be used to direct Target Testing or to support an anti-doping rule violation proceeding under Article 2.2, or both.]

[Comment to Article 6.3: As is the case in most medical contexts, use of anonymized Samples for quality assurance, quality improvement, or to establish reference populations is not considered research.]

6.4.2 *anti-doping organizations* may request that laboratories analyze their *Samples* using less extensive menus than those described in the Technical Document only if they have satisfied *Wada* that, because of the particular circumstances of their country or sport, as set out in their test distribution plan, less extensive analysis would be appropriate.

6.4.3 As provided in the international Standard for Laboratories, laboratories at their own initiative and expense may analyze *Samples* for *Prohibited Substances* or *Prohibited Methods* not included on the *Sample* analysis menu described in the Technical Document or specified by the *testing* authority. Results from any such analysis shall be reported and have the same validity and *Consequence* as any other analytical result.

6.5 Further Analysis of *Samples*

Any *Sample* may be subject to further analysis by the *anti-doping organization* responsible for results management at any time before both the A and B *Sample* analytical results (or A *Sample* result where B *Sample* analysis has been waived or will not be performed) have been communicated by the *anti-doping organization* to the *athlete* as the asserted basis for an Article 2.1 anti-doping rule violation.

[Comment to Article 6.4: The objective of this Article is to extend the principle of "Intelligent Testing" to the Sample analysis menu so as to most effectively and efficiently detect doping. It is recognized that the resources available to fight doping are limited and that increasing the Sample analysis menu may, in some sports and countries, reduce the number of Samples which can be analyzed.]

Samples may be stored and subjected to further analyses for the purpose of Article 6.2 at any time exclusively at the direction of the *anti-doping organization* that initiated and directed *Sample* collection or *Wada.* (Any *Sample* storage or further analysis initiated by *Wada* shall be at *Wada's* expense.) Further analysis of *Samples* shall conform with the requirements of the international Standard for Laboratories and the international Standard for Testing and investigations.

ARTICLE 7 RESULTS MANAGEMENT

Each *anti-doping organization* conducting results management shall establish a process for the pre-hearing administration of potential anti-doping rule violations that respects the following principles:

[Comment to Article 7: Various Signatories have created their own approaches to results management. While the various approaches have not been entirely uniform, many have proven to be fair and effective systems for results management. The Code does not supplant each of the Signatories' results management systems. This Article does, however, specify basic principles in order to ensure the fundamental fairness of the results management process which must be observed by each Signatory. The specific anti-doping rules of each Signatory shall be consistent with these basic principles. Not all anti-doping proceedings which have been initiated by an Anti-Doping Organization need to go to hearing. There may be cases where the Athlete or other Person agrees to the sanction which is either mandated by the Code or which the Anti-Doping Organization considers appropriate where flexibility in sanctioning is permitted. In all cases, a sanction imposed on the basis of such an agreement will be reported to parties with a right to appeal under Article 13.2.3 as provided in Article 14.2.2 and published as provided in Article 14.3.2.]

7.1 Responsibility for Conducting Results Management

Except as provided in Articles 7.1.1 and 7.1.2 below, results management and hearings shall be the responsibility of, and shall be governed by, the procedural rules of the *anti-doping organization* that initiated and directed *Sample* collection (or, if no *Sample* collection is involved, the *anti-doping organization* which first provides notice to an *athlete* or other *Person* of an asserted anti-doping rule violation and then diligently pursues that anti-doping rule violation). Regardless of which organization conducts results management or hearings, the principles set forth in this Article and Article 8 shall be respected and the rules identified in Article 23.2.2 to be incorporated without substantive change must be followed.

if a dispute arises between *anti-doping organizations* over which *anti-doping organization* has results management responsibility, *Wada* shall decide which organization has such responsibility. *Wada's* decision may be appealed to *CaS* within seven days of notification of the *Wada* decision by any of the *anti-doping organizations* involved in the dispute. The appeal shall be dealt with by *CaS* in an expedited manner and shall be heard before a single arbitrator.

Where a *national anti-doping organization* elects to collect additional *Samples* pursuant to Article 5.2.6, then it shall be considered the *anti-doping organization* that initiated and directed *Sample* collection. However, where the *national anti-doping organization* only directs the laboratory to perform additional types of analysis at the *national anti-doping organization's* expense, then the international Federation or *Major event organization* shall be considered the *anti-doping organization* that initiated and directed *Sample* collection.

[Comment to Article 7.1: In some cases, the procedural rules of the Anti-Doping Organization which initiated and directed the Sample collection may specify that results management will be handled by another organization (e.g., the Athlete's National Federation). In such event, it shall be the Anti-Doping Organization's responsibility to confirm that the other organization's rules are consistent with the Code.]

7.1.1 in circumstances where the rules of a *national anti-doping organization* do not give the *national anti-doping organization* authority over an *athlete* or other *Person* who is not a national, resident, license holder, or member of a sport organization of that country, or the *national anti-doping organization* declines to exercise such authority, results management shall be conducted by the applicable international Federation or by a third party as directed by the rules of the international Federation. Results management and the conduct of hearings for a test conducted by *Wada* on its own initiative, or an anti-doping rule violation discovered by *Wada*, will be conducted by the *anti-doping organization* designated by *Wada.* Results management and the conduct of hearings for a test conducted by the international Olympic Committee, the international Paralympic Committee, or another *Major event organization*, or an anti-doping rule violation discovered by one of those organizations, shall be referred to the applicable international Federation in relation to *Consequences* beyond exclusion from the *event, disqualification* of *event* results, forfeiture of any medals, points, or prizes from the *event,* or recovery of costs applicable to the anti-doping rule violation.

[Comment to Article 7.1.1: The Athlete's or other Person's International Federation has been made the Anti-Doping Organization of last resort for results management to avoid the possibility that no Anti-Doping Organization would have authority to conduct results management. An International Federation is free to provide in its own anti-doping rules that the Athlete's or other Person's National Anti-Doping Organization shall conduct results management.]

7.1.2 Results management in relation to a potential Whereabouts Failure (a filing failure or a missed test) shall be administered by the international Federation or the *national anti-doping organization* with whom the *athlete* in question files his or her whereabouts information, as provided in the international Standard for Testing and investigations. The *anti-doping organization* that determines a filing failure or a missed test shall submit that information to *Wada* through *adaMS* or another system approved by *Wada*, where it will be made available to other relevant *anti-doping organizations*.

7.2 Review Regarding *Adverse Analytical Findings*

Upon receipt of an *adverse analytical finding*, the *anti-doping organization* responsible for results management shall conduct a review to determine whether: (a) an applicable *tue* has been granted or will be granted as provided in the international Standard for Therapeutic Use Exemptions, or (b) there is any apparent departure from the international Standard for Testing and investigations or international Standard for Laboratories that caused the *adverse analytical finding*.

7.3 Notification After Review Regarding *Adverse Analytical Findings*

if the review of an *adverse analytical finding* under Article 7.2 does not reveal an applicable *tue* or entitlement to a *tue* as provided in the international Standard for Therapeutic Use Exemptions, or departure that caused the *adverse analytical finding*, the *anti-doping organization* shall promptly notify the *athlete*, in the manner set out in Articles 14.1.1 and 14.1.3 and its own rules, of: (a) the *adverse analytical finding*; (b) the anti-doping rule violated; and (c) the *athlete's* right to promptly request the analysis of the B *Sample* or, failing such request, that the B *Sample* analysis may be deemed waived; (d) the scheduled date, time and place for the B *Sample* analysis if the *athlete* or *anti-doping organization* chooses to request an analysis of the B *Sample*; (e) the opportunity for the *athlete* and/or the *athlete's* representative to attend the B *Sample* opening and analysis within the time period specified in the international Standard for Laboratories if such analysis is requested; and (f) the *athlete's* right to request copies of the A and B *Sample* laboratory documentation package which includes information as required by the international Standard for Laboratories. if the *anti-doping organization* decides not to bring forward the *adverse analytical finding* as an anti-doping rule violation, it shall so notify the *athlete* and the *anti-doping organizations* as described in Article 14.1.2.

in all cases where an *athlete* has been notified of an anti-doping rule violation that does not result in a mandatory *Provisional Suspension* under Article 7.9.1, the *athlete* shall be offered the opportunity to accept a *Provisional Suspension* pending the resolution of the matter.

7.4 Review of *Atypical Findings*

As provided in the international Standard for Laboratories, in some circumstances laboratories are directed to report the presence of *Prohibited Substances*, which may also be produced endogenously, as *atypical findings* subject to further investigation. Upon receipt of an *atypical finding*, the *anti-doping organization* responsible for results management shall conduct a review to determine whether: (a) an applicable *tue* has been granted or will be granted as provided in the international Standard for Therapeutic Use Exemptions, or (b) there is any apparent departure from the international Standard for Testing and investigations or international Standard for Laboratories that caused the *atypical finding.* if that review does not reveal an applicable *tue* or departure that caused the *atypical finding*, the *anti-doping organization* shall conduct the required investigation. After the investigation is completed, the *athlete* and other *anti-doping organizations* identified in Article 14.1.2 shall be notified whether or not the *atypical finding* will be brought forward as an *adverse analytical finding*. The *athlete* shall be notified as provided in Article 7.3.

7.4.1 The *anti-doping organization* will not provide notice of an *atypical finding* until it has completed its investigation and decided whether it will bring the *atypical finding* forward as an *adverse analytical finding* unless one of the following circumstances exists:

(a) if the *anti-doping organization* determines the B *Sample* should be analyzed prior to the conclusion of its investigation under Article 7.4,

[Comment to Article 7.4: The "required investigation" described in this Article will depend on the situation. For example, if it has previously determined that an Athlete has a naturally elevated testosterone/epitestosterone ratio, confirmation that an Atypical Finding is consistent with that prior ratio is a sufficient investigation.]

the *anti-doping organization* may conduct the B *Sample* analysis after notifying the *athlete*, with such notice to include a description of the *atypical finding* and the information described in Article 7.3(d)-(f).

(b) if the *anti-doping organization* receives a request, either from a *Major event organization* shortly before one of its *International events* or a request from a sport organization responsible for meeting an imminent deadline for selecting team members for an *International event*, to disclose whether any *athlete* identified on a list provided by the *Major event organization* or sport organization has a pending *atypical finding*, the *anti-doping organization* shall so identify any such *athlete* after first providing notice of the *atypical finding* to the *athlete.*

7.5 Review of *Atypical Passport Findings* and *Adverse Passport Findings*

Review of *atypical Passport findings* and *adverse Passport findings* shall take place as provided in the international Standard for Testing and investigations and international Standard for Laboratories. At such time as the *anti-doping organization* is satisfied that an anti-doping rule violation has occurred, it shall promptly give the *athlete* notice, in the manner set out in its rules, of the anti-doping rule violated, and the basis of the violation. Other *anti-doping organizations* shall be notified as provided in Article 14.1.2.

[Comment to Article 7.4.1(b): Under the circumstance described in Article 7.4.1(b), the option to take action would be left to the Major Event Organization or sport organization consistent with its rules.]

7.6 Review of Whereabouts Failures

Review of potential filing failures and missed tests shall take place as provided in the international Standard for Testing and investigations. At such time as the international Federation or *national anti-doping organization* (as applicable) is satisfied that an Article 2.4 anti-doping rule violation has occurred, it shall promptly give the *athlete* notice, in the manner set out in its rules, that it is asserting a violation of Article 2.4 and the basis of that assertion. Other *anti-doping organizations* shall be notified as provided in Article 14.1.2.

7.7 Review of Other Anti-Doping Rule Violations Not Covered by Articles 7.1–7.6

The *anti-doping organization* or other reviewing body established by such organization shall conduct any follow-up investigation into a possible anti-doping rule violation as may be required under applicable anti-doping policies and rules adopted pursuant to the *Code* or which the *anti-doping organization* otherwise considers appropriate. At such time as the *anti-doping organization* is satisfied that an anti-doping rule violation has occurred, it shall promptly give the *athlete* or other *Person* notice, in the manner set out in its rules, of the anti-doping rule violated, and the basis of the violation. Other *anti-doping organizations* shall be notified as provided in Article 14.1.2.

[Comment to Articles 7.1, 7.6 and 7.7: For example, an International Federation typically would notify the Athlete through the Athlete's National Federation.]

7.8 Identification of Prior Anti-Doping Rule Violations

Before giving an *athlete* or other *Person* notice of an asserted anti-doping rule violation as provided above, the *anti-doping organization* shall refer to *adaMS* or another system approved by *Wada* and contact *Wada* and other relevant *anti-doping organizations* to determine whether any prior anti-doping rule violation exists.

7.9 Principles Applicable to *Provisional Suspensions*

7.9.1 Mandatory *Provisional Suspension* after an *adverse analytical finding.*

The *Signatories* listed below shall adopt rules providing that when an *adverse analytical finding* is received for a *Prohibited Substance* or a *Prohibited Method*, other than a *Specified Substance*, a *Provisional Suspension* shall be imposed promptly after the review and notification described in Article 7.2, 7.3 or 7.5: where the *Signatory* is the ruling body of an *event* (for application to that *event*); where the *Signatory* is responsible for team selection (for application to that team selection); where the *Signatory* is the applicable international Federation; or where the *Signatory* is another *anti-doping organization* which has results management authority over the alleged anti-doping rule violation. A mandatory *Provisional Suspension* may be eliminated if the *athlete* demonstrates to the hearing panel that the violation is likely to have involved a *Contaminated Product.* A hearing body's decision not to eliminate a mandatory *Provisional Suspension* on account of the *athlete's* assertion regarding a *Contaminated Product* shall not be appealable.

Provided, however, that a *Provisional Suspension* may not be imposed unless the *athlete* is given either: (a) an opportunity for a *Provisional hearing,* either before imposition of the

Provisional Suspension or on a timely basis after imposition of the *Provisional Suspension*; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a *Provisional Suspension*.

7.9.2 Optional *Provisional Suspension* based on an *adverse analytical finding* for *Specified Substances*, *Contaminated Products*, or other Anti-Doping Rule Violations.

A *Signatory* may adopt rules, applicable to any *event* for which the *Signatory* is the ruling body or to any team selection process for which the *Signatory* is responsible or where the *Signatory* is the applicable international Federation or has results management authority over the alleged anti-doping rule violation, permitting *Provisional Suspensions* to be imposed for anti-doping rule violations not covered by Article 7.9.1 prior to analysis of the *athlete's* B *Sample* or final hearing as described in Article 8.

Provided, however, that a *Provisional Suspension* may not be imposed unless the *athlete* or other *Person* is given either: (a) an opportunity for a *Provisional hearing,* either before imposition of the *Provisional Suspension* or on a timely basis after imposition of the *Provisional Suspension*; or (b) an opportunity for an expedited hearing in accordance with Article 8 on a timely basis after imposition of a *Provisional Suspension*.

if a *Provisional Suspension* is imposed based on an A *Sample adverse analytical finding* and a subsequent B *Sample* analysis (if requested by the *athlete* or *anti-doping organization*) does not confirm the A *Sample* analysis, then the *athlete* shall not be subject to any further *Provisional Suspension* on account of a violation of Article 2.1. in circumstances where the *athlete* (or the *athlete's* team as may be provided in the rules

of the applicable *Major event organization* or international Federation) has been removed from a *Competition* based on a violation of Article 2.1 and the subsequent B *Sample* analysis does not confirm the A *Sample* finding, if, without otherwise affecting the *Competition*, it is still possible for the *athlete* or team to be reinserted, the *athlete* or team may continue to take part in the *Competition*.

7.10 Notification of Results Management Decisions

in all cases where an *anti-doping organization* has asserted the commission of an anti-doping rule violation, withdrawn the assertion of an anti-doping rule violation, imposed a *Provisional Suspension*, or agreed with an *athlete* or other *Person* to the imposition of a sanction without a hearing, that *anti-doping organization* shall give notice thereof as set forth in Article 14.2.1 to other *anti-doping organizations* with a right to appeal under Article 13.2.3.

[Comment to Article 7.9: Before a Provisional Suspension can be unilaterally imposed by an Anti-Doping Organization, the internal review specified in the Code must first be completed. In addition, the Signatory imposing a Provisional Suspension shall ensure that the Athlete is given an opportunity for a Provisional Hearing either before or promptly after the imposition of the Provisional Suspension, or an expedited final hearing under Article 8 promptly after imposition of the Provisional Suspension. The Athlete has a right to appeal under Article 13.2.3.

In the rare circumstance where the B Sample analysis does not confirm the A Sample finding, the Athlete who had been Provisionally Suspended will be allowed, where circumstances permit, to participate in subsequent Competitions during the Event. Similarly, depending upon the relevant rules of the International Federation in a Team Sport, if the team is still in Competition, the Athlete may be able to take part in future Competitions.

Athletes and other Persons shall receive credit for a Provisional Suspension against any period of Ineligibility which is ultimately imposed or accepted as provided in Article 10.11.3 or 10.11.4.]

7.11 Retirement from Sport

if an *athlete* or other *Person* retires while a results management process is underway, the *anti-doping organization* conducting the results management process retains jurisdiction to complete its results management process. if an *athlete* or other *Person* retires before any results management process has begun, the *anti-doping organization* which would have had results management authority over the *athlete* or other *Person* at the time the *athlete* or other *Person* committed an anti-doping rule violation, has authority to conduct results management.

ARTICLE 8 RIGHT TO A FAIR HEARING AND NOTICE OF HEARING DECISION

8.1 Fair Hearings

For any *Person* who is asserted to have committed an anti-doping rule violation, each *anti-doping organization* with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason(s) for any period of *Ineligibility* shall be *Publicly disclosed* as provided in Article 14.3.

[Comment to Article 7.11: Conduct by an Athlete or other Person before the Athlete or other Person was subject to the jurisdiction of any Anti-Doping Organization would not constitute an anti-doping rule violation but could be a legitimate basis for denying the Athlete or other Person membership in a sports organization.]

[Comment to Article 8.1: This Article requires that at some point in the results management process, the Athlete or other Person shall be provided the opportunity for a timely, fair and impartial hearing. These principles are also found in Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and are principles generally accepted in international law. This Article is not intended to supplant each Anti-Doping Organization's own rules for hearings but rather to ensure that each Anti-Doping Organization provides a hearing process consistent with these principles.]

8.2 *Event* Hearings

Hearings held in connection with *events* may be conducted by an expedited process as permitted by the rules of the relevant *anti-doping organization* and the hearing panel.

8.3 Waiver of Hearing

The right to a hearing may be waived either expressly or by the *athlete's* or other *Person's* failure to challenge an *anti-doping organization's* assertion that an anti-doping rule violation has occurred within the specific time period provided in the *anti-doping organization's* rules.

8.4 Notice of Decisions

The reasoned hearing decision, or in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the *anti-doping organization* with results management responsibility to the *athlete* and to other *anti-doping organizations* with a right to appeal under Article 13.2.3 as provided in Article 14.2.1.

[Comment to Article 8.2: For example, a hearing could be expedited on the eve of a major Event where the resolution of the anti-doping rule violation is necessary to determine the Athlete's eligibility to participate in the Event or during an Event where the resolution of the case will affect the validity of the Athlete's results or continued participation in the Event.]

8.5 Single Hearing Before *CAS*

Anti-doping rule violations asserted against *International-level athletes* or *national-level athletes* may, with the consent of the *athlete*, the *anti-doping organization* with results management responsibility, *Wada*, and any other *anti-doping organization* that would have had a right to appeal a first instance hearing decision to *CaS*, be heard directly at *CaS*, with no requirement for a prior hearing.

ARTICLE 9 AUTOMATIC *DISQUALIFICATION* OF INDIVIDUAL RESULTS

An anti-doping rule violation in *Individual Sports* in connection with an *In-Competition* test automatically leads to *disqualification* of the result obtained in that *Competition* with all resulting *Consequences*, including forfeiture of any medals, points and prizes.

[Comment to Article 8.5: In some cases, the combined cost of holding a hearing in the first instance at the international or national level, then rehearing the case de novo before CAS can be very substantial. Where all of the parties identified in this Article are satisfied that their interests will be adequately protected in a single hearing, there is no need for the Athlete or Anti-Doping Organizations to incur the extra expense of two hearings. An Anti-Doping Organization that wants to participate in the CAS hearing as a party or as an observer may condition its approval of a single hearing on being granted that right.]

[Comment to Article 9: For Team Sports, any awards received by individual players will be Disqualified. However, Disqualification of the team will be as provided in Article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.]

ARTICLE 10 SANCTIONS ON INDIVIDUALS

10.1 *Disqualification* of Results in the *Event* during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an *event* may, upon the decision of the ruling body of the *event*, lead to *disqualification* of all of the *athlete's* individual results obtained in that *event* with all *Consequences*, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to *disqualify* other results in an *event* might include, for example, the seriousness of the *athlete's* anti-doping rule violation and whether the *athlete* tested negative in the other *Competitions.*

10.1.1 if the *athlete* establishes that he or she bears *no fault or negligence* for the violation, the *athlete's* individual results in the other *Competitions* shall not be *disqualified*, unless the *athlete's* results in *Competitions* other than the *Competition* in which the anti-doping rule violation occurred were likely to have been affected by the *athlete's* anti-doping rule violation.

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

[Comment to Article 10.1: Whereas Article 9 Disqualifies the result in a single Competition in which the Athlete tested positive (e.g., the 100 meter backstroke), this Article may lead to Disqualification of all results in all races during the Event (e.g., the FINA World Championships).]

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance,* unless the *athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and the *anti-doping organization* can establish that the anti-doping rule violation was intentional.

10.2.2 if Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those *athletes* who cheat. The term, therefore, requires that the *athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *adverse analytical finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not "intentional" if the substance is a *Specified Substance* and the *athlete* can establish that the *Prohibited Substance* was *used out-of-Competition*. An anti-doping rule violation resulting from an *adverse analytical finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *athlete* can establish that the *Prohibited Substance* was *used out-of-Competition* in a context unrelated to sport performance.

10.3 *Ineligibility* for Other Anti-Doping Rule Violations

The period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Article 10.5 or 10.6 are applicable:

10.3.1 For violations of Article 2.3 or Article 2.5, the period of *Ineligibility* shall be four years unless, in the case of failing to submit to *Sample* collection, the *athlete* can establish that the commission of the anti-doping rule violation was not intentional (as defined in Article 10.2.3), in which case the period of *Ineligibility* shall be two years.

10.3.2 For violations of Article 2.4, the period of *Ineligibility* shall be two years, subject to reduction down to a minimum of one year, depending on the *athlete's* degree of *fault*. The flexibility between two years and one year of *Ineligibility* in this Article is not available to *athletes* where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the *athlete* was trying to avoid being available for *testing*.

10.3.3 For violations of Article 2.7 or 2.8, the period of *Ineligibility* shall be a minimum of four years up to lifetime *Ineligibility*, depending on the seriousness of the violation. An Article 2.7 or Article 2.8 violation involving a *Minor* shall be considered a particularly serious violation and, if committed by *athlete Support Personnel* for violations other than for *Specified Substances*, shall result in lifetime *Ineligibility* for *athlete Support Personnel*. in addition, significant violations of Article 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.

[Comment to Article 10.3.3: Those who are involved in doping Athletes or covering up doping should be subject to sanctions which are more severe than the Athletes who test positive. Since the authority of sport organizations is generally limited to Ineligibility for accreditation, membership and other sport benefits, reporting Athlete Support Personnel to competent authorities is an important step in the deterrence of doping.]

10.3.4 For violations of Article 2.9, the period of *Ineligibility* imposed shall be a minimum of two years, up to four years, depending on the seriousness of the violation.

10.3.5 For violations of Article 2.10, the period of *Ineligibility* shall be two years, subject to reduction down to a minimum of one year, depending on the *athlete* or other *Person's* degree of *fault* and other circumstances of the case.

10.4 Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence*

if an *athlete* or other *Person* establishes in an individual case that he or she bears *no fault or negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

[Comment to Article 10.3.5: Where the "other Person" referenced in Article 2.10 is an entity and not an individual, that entity may be disciplined as provided in Article 12.]

[Comment to Article 10.4: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.]

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance*, and the *athlete* or other *Person* can establish *no Significant fault or negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *athlete's* or other *Person's* degree of *fault*.

10.5.1.2 *Contaminated Products*

in cases where the *athlete* or other *Person* can establish *no Significant fault or negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *athlete's* or other *Person's* degree of *fault*.

10.5.2 Application of *no Significant fault or negligence* beyond the Application of Article 10.5.1

[Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]

if an *athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *no Significant fault or negligence,* then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *athlete* or other *Person's* degree of *fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. if the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

10.6 Elimination, Reduction, or Suspension of Period of *Ineligibility* or other *Consequences* for Reasons other than *Fault*

10.6.1 *Substantial assistance* in Discovering or Establishing Anti-Doping Rule Violations.

10.6.1.1 An *anti-doping organization* with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of *Ineligibility* imposed in an individual case where the *athlete* or other *Person* has provided *Substantial assistance* to an *anti-doping organization*, criminal authority or professional disciplinary body which results in: (i) the *anti-doping organization* discovering or bringing forward an anti-doping rule violation by

[Comment to Article 10.5.2: Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.]

another *Person*, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another *Person* and the information provided by the *Person* providing *Substantial assistance* is made available to the *anti-doping organization* with results management responsibility. After a final appellate decision under Article 13 or the expiration of time to appeal, an *anti-doping organization* may only suspend a part of the otherwise applicable period of *Ineligibility* with the approval of *Wada* and the applicable international Federation. The extent to which the otherwise applicable period of *Ineligibility* may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the *athlete* or other *Person* and the significance of the *Substantial assistance* provided by the *athlete* or other *Person* to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of *Ineligibility* may be suspended. if the otherwise applicable period of *Ineligibility* is a lifetime, the non-suspended period under this Article must be no less than eight years. if the *athlete* or other *Person* fails to continue to cooperate and to provide the complete and credible *Substantial assistance* upon which a suspension of the period of *Ineligibility* was based, the *anti-doping organization* that suspended the period of *Ineligibility* shall reinstate the original period of *Ineligibility*. if an *anti-doping organization* decides to reinstate a suspended period of *Ineligibility* or decides not to reinstate

a suspended period of *Ineligibility*, that decision may be appealed by any *Person* entitled to appeal under Article 13.

10.6.1.2 To further encourage *athletes* and other *Persons* to provide *Substantial assistance* to *anti-doping organizations*, at the request of the *anti-doping organization* conducting results management or at the request of the *athlete* or other *Person* who has, or has been asserted to have, committed an anti-doping rule violation, *Wada* may agree at any stage of the results management process, including after a final appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of *Ineligibility* and other *Consequences*. in exceptional circumstances, *Wada* may agree to suspensions of the period of *Ineligibility* and other *Consequences* for *Substantial assistance* greater than those otherwise provided in this Article, or even no period of *Ineligibility*, and/or no return of prize money or payment of fines or costs. *Wada's* approval shall be subject to reinstatement of sanction, as otherwise provided in this Article. Notwithstanding Article 13, *Wada's* decisions in the context of this Article may not be appealed by any other *anti-doping organization.*

10.6.1.3 if an *anti-doping organization* suspends any part of an otherwise applicable sanction because of *Substantial assistance*, then notice providing justification for the decision shall be provided to the other *anti-doping organizations* with a right to appeal under Article 13.2.3 as provided in Article 14.2. in unique circumstances where *Wada*

determines that it would be in the best interest of anti-doping, *Wada* may authorize an *anti-doping organization* to enter into appropriate confidentiality agreements limiting or delaying the disclosure of the *Substantial assistance* agreement or the nature of *Substantial assistance* being provided.

10.6.2 Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence

Where an *athlete* or other *Person* voluntarily admits the commission of an anti-doping rule violation before having received notice of a *Sample* collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of *Ineligibility* may be reduced, but not below one-half of the period of *Ineligibility* otherwise applicable.

10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1

[Comment to Article 10.6.1: The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport. This is the only circumstance under the Code where the suspension of an otherwise applicable period of Ineligibility is authorized.]

[Comment to Article 10.6.2: This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught. The amount by which Ineligibility is reduced should be based on the likelihood that the Athlete or other Person would have been caught had he or she not come forward voluntarily.]

An *athlete* or other *Person* potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing *Sample Collection* or *tampering* with *Sample Collection*), by promptly admitting the asserted anti-doping rule violation after being confronted by an *anti-doping organization*, and also upon the approval and at the discretion of both *Wada* and the *anti-doping organization* with results management responsibility, may receive a reduction in the period of *Ineligibility* down to a minimum of two years, depending on the seriousness of the violation and the *athlete* or other *Person's* degree of *fault*.

10.6.4 Application of Multiple grounds for Reduction of a Sanction

Where an *athlete* or other *Person* establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or suspension under Article 10.6, the otherwise applicable period of *Ineligibility* shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. if the *athlete* or other *Person* establishes entitlement to a reduction or suspension of the period of *Ineligibility* under Article 10.6, then the period of *Ineligibility* may be reduced or suspended, but not below one-fourth of the otherwise applicable period of *Ineligibility*.

[Comment to Article 10.6.4: The appropriate sanction is determined in a sequence of four steps. First, the hearing panel determines which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) apply to the particular anti-doping rule violation. Second, if the basic sanction provides for a range of sanctions, the hearing panel must determine the applicable sanction within that range according to the Athlete or other Person's degree of Fault. In a third step, the hearing panel establishes whether there is a basis for elimination, suspension, or reduction of the sanction (Article 10.6). Finally, the hearing panel decides on the commencement of the period of Ineligibility under Article 10.11.

Several examples of how Article 10 is to be applied are found in Appendix 2.]

10.7 Multiple Violations

10.7.1 For an *athlete* or other *Person's* second anti-doping rule violation, the period of *Ineligibility* shall be the greater of:

(a) six months;

(b) one-half of the period of *Ineligibility* imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or

(c) twice the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6.

The period of *Ineligibility* established above may then be further reduced by the application of Article 10.6.

10.7.2 A third anti-doping rule violation will always result in a lifetime period of *Ineligibility*, except if the third violation fulfills the condition for elimination or reduction of the period of *Ineligibility* under Article 10.4 or 10.5, or involves a violation of Article 2.4. in these particular cases, the period of *Ineligibility* shall be from eight years to lifetime *Ineligibility*.

10.7.3 An anti-doping rule violation for which an *athlete* or other *Person* has established *no fault or negligence* shall not be considered a prior violation for purposes of this Article.

10.7.4 Additional Rules for Certain Potential Multiple Violations

10.7.4.1 For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the *anti-doping organization* can establish that the *athlete* or other *Person* committed the second anti-doping rule violation after the *athlete* or

other *Person* received notice pursuant to Article 7, or after the *anti-doping organization* made reasonable efforts to give notice of the first anti-doping rule violation. if the *anti-doping organization* cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction.

10.7.4.2 if, after the imposition of a sanction for a first anti-doping rule violation, an *anti-doping organization* discovers facts involving an anti-doping rule violation by the *athlete* or other *Person* which occurred prior to notification regarding the first violation, then the *anti-doping organization* shall impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time. Results in all *Competitions* dating back to the earlier anti-doping rule violation will be *disqualified* as provided in Article 10.8.

10.7.5 Multiple Anti-Doping Rule Violations during Ten-year Period

For purposes of Article 10.7, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations.

10.8 *Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection or Commission of an Anti-Doping Rule Violation

in addition to the automatic *disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9, all other competitive results of the *athlete* obtained from the date a positive *Sample* was collected (whether *In-Competition* or *out-of-Competition*), or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.

10.9 Allocation of *CAS* Cost Awards and Forfeited Prize Money

The priority for repayment of *CaS* cost awards and forfeited prize money shall be: first, payment of costs awarded by *CaS*; second, reallocation of forfeited prize money to other *athletes* if provided for in the rules of the applicable International Federation; and third, reimbursement of the expenses of the *anti-doping organization* that conducted results management in the case.

10.10 *Financial Consequences*

anti-doping organizations may, in their own rules, provide for proportionate recovery of costs or financial sanctions on account of anti-doping rule violations. However, *anti-doping organizations* may only impose financial sanctions in cases where the maximum period of *Ineligibility* otherwise applicable has already been imposed. Financial sanctions may only be imposed where the principle of proportionality is satisfied. No recovery of

[Comment to Article 10.8: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

costs or financial sanction may be considered a basis for reducing the *Ineligibility* or other sanction which would otherwise be applicable under the *Code*.

10.11 Commencement of *Ineligibility* Period

Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived or there is no hearing, on the date *Ineligibility* is accepted or otherwise imposed.

10.11.1 Delays Not Attributable to the *athlete* or other *Person*

Where there have been substantial delays in the hearing process or other aspects of *doping Control* not attributable to the *athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *disqualified*.

10.11.2 Timely Admission

Where the *athlete* or other *Person* promptly (which, in all events, for an *athlete* means before the *athlete* competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the *anti-doping organization*, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule

[Comment to Article 10.11.1: In cases of anti-doping rule violations other than under Article 2.1, the time required for an Anti-Doping Organization to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.]

violation last occurred. in each case, however, where this Article is applied, the *athlete* or other *Person* shall serve at least one-half of the period of *Ineligibility* going forward from the date the *athlete* or other *Person* accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Article shall not apply where the period of *Ineligibility* already has been reduced under Article 10.6.3.

10.11.3 Credit for *Provisional Suspension* or Period of *Ineligibility* Served

10.11.3.1 if a *Provisional Suspension* is imposed and respected by the *athlete* or other *Person*, then the *athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. if a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *athlete* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

10.11.3.2 if an *athlete* or other *Person* voluntarily accepts a *Provisional Suspension* in writing from an *anti-doping organization* with results management authority and thereafter respects the *Provisional Suspension*, the *athlete* or other *Person* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *athlete* or other *Person's* voluntary acceptance of a *Provisional Suspension*

shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.

10.11.3.3 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *athlete* elected not to compete or was suspended by his or her team.

10.11.3.4 in *team Sports*, where a period of *Ineligibility* is imposed upon a team, unless fairness requires otherwise, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed. Any period of team *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served.

10.12 Status during *Ineligibility*

10.12.1 Prohibition against Participation during *Ineligibility*

No *athlete* or other *Person* who has been declared *Ineligible* may, during the period of *Ineligibility*, participate in any capacity in a *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized

[Comment to Article 10.11.3.2: An Athlete's voluntary acceptance of a Provisional Suspension is not an admission by the Athlete and shall not be used in any way to draw an adverse inference against the Athlete.]

[Comment to Article 10.11: Article 10.11 makes clear that delays not attributable to the Athlete, timely admission by the Athlete and Provisional Suspension are the only justifications for starting the period of Ineligibility earlier than the date of the final hearing decision.]

or organized by any *Signatory, Signatory's* member organization, or a club or other member organization of a *Signatory's* member organization, or in *Competitions* authorized or organized by any professional league or any international- or national-level *event* organization or any elite or national-level sporting activity funded by a governmental agency.

An *athlete* or other *Person* subject to a period of *Ineligibility* longer than four years may, after completing four years of the period of *Ineligibility*, participate as an *athlete* in local sport events not sanctioned or otherwise under the jurisdiction of a *Code Signatory* or member of a *Code Signatory*, but only so long as the local sport event is not at a level that could otherwise qualify such *athlete* or other *Person* directly or indirectly to compete in (or accumulate points toward) a national championship or *International event*, and does not involve the *athlete* or other *Person* working in any capacity with *Minors*.

An *athlete* or other *Person* subject to a period of *Ineligibility* shall remain subject to *testing.*

[Comment to Article 10.12.1: For example, subject to Article 10.12.2 below, an Ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in Article 10.12.3. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Mutual Recognition).]

10.12.2 Return to Training

As an exception to Article 10.12.1, an *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory's* member organization during the shorter of: (1) the last two months of the *athlete's* period of *Ineligibility*, or (2) the last one-quarter of the period of *Ineligibility* imposed.

10.12.3 Violation of the Prohibition of Participation during *Ineligibility*

Where an *athlete* or other *Person* who has been declared *Ineligible* violates the prohibition against participation during *Ineligibility* described in Article 10.12.1, the results of such participation shall be *disqualified* and a new period of *Ineligibility* equal in length to the original period of *Ineligibility* shall be added to the end of the original period of *Ineligibility*. The new period of *Ineligibility* may be adjusted based on the *athlete* or other *Person's* degree of *fault* and other circumstances of the case. The determination of whether an *athlete* or other *Person* has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the *anti-doping organization* whose results management led to the imposition of the initial period of *Ineligibility*. This decision may be appealed under Article 13.

[Comment to Article 10.12.2: In many Team Sports and some individual sports (e.g., ski jumping and gymnastics), an Athlete cannot effectively train on his or her own so as to be ready to compete at the end of the Athlete's period of Ineligibility. During the training period described in this Article, an Ineligible Athlete may not compete or engage in any activity described in Article 10.12.1 other than training.]

Where an *athlete Support Person* or other *Person* assists a *Person* in violating the prohibition against participation during *Ineligibility*, an *anti-doping organization* with jurisdiction over such *athlete Support Person* or other *Person* shall impose sanctions for a violation of Article 2.9 for such assistance.

10.12.4 Withholding of Financial Support during *Ineligibility*

in addition, for any anti-doping rule violation not involving a reduced sanction as described in Article 10.4 or 10.5, some or all sport-related financial support or other sport-related benefits received by such *Person* will be withheld by *Signatories, Signatories'* member organizations and governments.

10.13 Automatic Publication of Sanction

A mandatory part of each sanction shall include automatic publication, as provided in Article 14.3.

[Comment to Article 10: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short, a standard period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.]

ARTICLE 11 *CONSEQUENCES* TO TEAMS

11.1 *Testing* of *Team Sports*

Where more than one member of a team in a *team Sport* has been notified of an anti-doping rule violation under Article 7 in connection with an *event*, the ruling body for the *event* shall conduct appropriate *target testing* of the team during the *event Period*.

11.2 *Consequences* for *Team Sports*

if more than two members of a team in a *team Sport* are found to have committed an anti-doping rule violation during an *event Period,* the ruling body of the *event* shall impose an appropriate sanction on the team (e.g., loss of points, *disqualification* from a *Competition* or *event,* or other sanction) in addition to any *Consequences* imposed upon the individual *athletes* committing the anti-doping rule violation.

11.3 *Event* Ruling Body may Establish Stricter *Consequences* for *Team Sports*

The ruling body for an *event* may elect to establish rules for the *event* which impose *Consequences* for *team Sports* stricter than those in Article 11.2 for purposes of the *event*.

[Comment to Article 11.3: For example, the International Olympic Committee could establish rules which would require Disqualification of a team from the Olympic Games based on a lesser number of anti-doping rule violations during the period of the Games.]

ARTICLE 12 SANCTIONS AGAINST SPORTING BODIES

Nothing in the *Code* precludes any *Signatory* or government accepting the *Code* from enforcing its own rules for the purpose of imposing sanctions on another sporting body over which the *Signatory* or a member of the *Signatory* or government has authority.

ARTICLE 13 APPEALS

13.1 Decisions Subject to Appeal

Decisions made under the *Code* or rules adopted pursuant to the *Code* may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in the *Code* or *International Standards*. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review provided in the *anti-doping organization's* rules must be exhausted, provided that such review respects the principles set forth in Article 13.2.2 below (except as provided in Article 13.1.3).

13.1.1 Scope of Review Not Limited

The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker.

[Comment to Article 12: This Article makes it clear that the Code does not restrict whatever disciplinary rights between organizations may otherwise exist.]

13.1.2 *CaS* Shall Not Defer to the Findings Being Appealed

in making its decision, *CaS* need not give deference to the discretion exercised by the body whose decision is being appealed.

13.1.3 *Wada* Not Required to Exhaust internal Remedies

Where *Wada* has a right to appeal under Article 13 and no other party has appealed a final decision within the *anti-doping organization's* process, *Wada* may appeal such decision directly to *CaS* without having to exhaust other remedies in the *anti-doping organization's* process.

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, *Consequences*, *Provisional Suspensions*, Recognition of Decisions and Jurisdiction

A decision that an anti-doping rule violation was committed, a decision imposing *Consequences* or not imposing *Consequences* for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision by *Wada* not to grant an exception to the six months notice requirement for a retired *athlete* to return to *Competition* under Article 5.7.1; a decision by *Wada* assigning results management under Article 7.1; a decision by an

[Comment to Article 13.1.2: CAS proceedings are de novo. Prior proceedings do not limit the evidence or carry weight in the hearing before CAS.]

[Comment to Article 13.1.3: Where a decision has been rendered before the final stage of an Anti-Doping Organization's process (for example, a first hearing) and no party elects to appeal that decision to the next level of the Anti-Doping Organization's process (e.g., the Managing Board), then WADA may bypass the remaining steps in the Anti-Doping Organization's internal process and appeal directly to CAS.]

anti-doping organization not to bring forward an *adverse analytical finding* or an *atypical finding* as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation under Article 7.7; a decision to impose a *Provisional Suspension* as a result of a *Provisional hearing*; an *anti-doping organization's* failure to comply with Article 7.9; a decision that an *anti-doping organization* lacks jurisdiction to rule on an alleged anti-doping rule violation or its *Consequences;* a decision to suspend, or not suspend, a period of *Ineligibility* or to reinstate, or not reinstate, a suspended period of *Ineligibility* under Article 10.6.1; a decision under Article 10.12.3*;* and a decision by an *anti-doping organization* not to recognize another *anti-doping organization's* decision under Article 15 may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals involving *International-level athletes* or *International events*

in cases arising from participation in an *International event* or in cases involving *International-level athletes*, the decision may be appealed exclusively to *CAS.*

13.2.2 Appeals involving Other *athletes* or Other *Persons*

in cases where Article 13.2.1 is not applicable, the decision may be appealed to an independent and impartial body in accordance with rules established by the *national anti-doping organization*. The rules for such appeal shall respect the following principles:

[Comment to Article 13.2.1: CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards.]

- a timely hearing;
- a fair and impartial hearing panel;
- the right to be represented by counsel at the *Person's* own expense; and
- a timely, written, reasoned decision.

13.2.3 *Persons* Entitled to Appeal

in cases under Article 13.2.1, the following parties shall have the right to appeal to *CaS*: (a) the *athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the *national anti-doping organization* of the *Person's* country of residence or countries where the *Person* is a national or license holder; (e) the international Olympic Committee or international Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic games or Paralympic games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (f) *Wada*.

in cases under Article 13.2.2, the parties having the right to appeal to the national-level appeal body shall be as provided in the *national anti-doping organization's* rules but, at a minimum, shall include the following parties: (a) the *athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the *national anti-doping organization* of the *Person's* country of residence; (e) the International Olympic Committee or international Paralympic Committee, as applicable, where the decision

[Comment to Article 13.2.2: An Anti-Doping Organization may elect to comply with this Article by providing for the right to appeal directly to CAS.]

may have an effect in relation to the Olympic games or Paralympic games, including decisions affecting eligibility for the Olympic games or Paralympic games, and (f) *Wada*. For cases under Article 13.2.2, *Wada,* the international Olympic Committee, the international Paralympic Committee, and the relevant international Federation shall also have the right to appeal to *CaS* with respect to the decision of the national-level appeal body. Any party filing an appeal shall be entitled to assistance from *CaS* to obtain all relevant information from the *anti-doping organization* whose decision is being appealed and the information shall be provided if *CaS* so directs.

The filing deadline for an appeal filed by *Wada* shall be the later of:

(a) Twenty-one days after the last day on which any other party in the case could have appealed, or

(b) Twenty-one days after *Wada's* receipt of the complete file relating to the decision.

Notwithstanding any other provision herein, the only *Person* who may appeal from a *Provisional Suspension* is the *athlete* or other *Person* upon whom the *Provisional Suspension* is imposed.

13.2.4. Cross Appeals and other Subsequent Appeals Allowed

Cross appeals and other subsequent appeals by any respondent named in cases brought to *CaS* under the *Code* are specifically permitted. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal at the latest with the party's answer.

13.3 Failure to Render a Timely Decision by an *Anti-Doping Organization*

Where, in a particular case, an *anti-doping organization* fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by *Wada*, *Wada* may elect to appeal directly to *CaS* as if the *anti-doping organization* had rendered a decision finding no anti-doping rule violation. if the *CaS* hearing panel determines that an anti-doping rule violation was committed and that *Wada* acted reasonably in electing to appeal directly to *CaS*, then *Wada's* costs and attorney fees in prosecuting the appeal shall be reimbursed to *Wada* by the *anti-doping organization*.

[Comment to Article 13.2.4: This provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision permits a full hearing for all parties.]

[Comment to Article 13.3: Given the different circumstances of each anti-doping rule violation investigation and results management process, it is not feasible to establish a fixed time period for an Anti-Doping Organization to render a decision before WADA may intervene by appealing directly to CAS. Before taking such action, however, WADA will consult with the Anti-Doping Organization and give the Anti-Doping Organization an opportunity to explain why it has not yet rendered a decision. Nothing in this Article prohibits an International Federation from also having rules which authorize it to assume jurisdiction for matters in which the results management performed by one of its National Federations has been inappropriately delayed.]

13.4 Appeals Relating to *TUEs*

tue decisions may be appealed exclusively as provided in Article 4.4.

13.5 Notification of Appeal Decisions

Any *anti-doping organization* that is a party to an appeal shall promptly provide the appeal decision to the *athlete* or other *Person* and to the other *anti-doping organizations* that would have been entitled to appeal under Article 13.2.3 as provided under Article 14.2.

13.6 Appeals from Decisions under Part Three and Part Four of the *Code*

With respect to a *Wada* report of non-compliance under Article 23.5.4, or any *Consequences* imposed under Part Three (Roles and Responsibilities) of the *Code*, the entity to which the *Wada* report pertains or upon which *Consequences* are imposed under Part Three of the *Code* shall have the right to appeal exclusively to *CaS* in accordance with the provisions applicable before such court.

13.7 Appeals from Decisions Suspending or Revoking Laboratory Accreditation

Decisions by *Wada* to suspend or revoke a laboratory's *Wada* accreditation may be appealed only by that laboratory with the appeal being exclusively to *CaS*.

[Comment to Article 13: The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal. Anti-doping decisions by Anti-Doping Organizations are made transparent in Article 14. Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions. Note that the definition of interested Persons and organizations with a right to appeal under Article 13 does not include Athletes, or their federations, who might benefit from having another competitor disqualified.]

ARTICLE 14 CONFIDENTIALITY AND REPORTING

The principles of coordination of anti-doping results, public transparency and accountability and respect for the privacy of all *athletes* or other *Persons* are as follows:

14.1 Information Concerning *Adverse Analytical Findings, Atypical Findings,* and other Asserted Anti-Doping Rule Violations

14.1.1 Notice of Anti-Doping Rule Violations to *athletes* and other *Persons*

The form and manner of notice of an asserted anti-doping rule violation shall be as provided in the rules of the *anti-doping organization* with results management responsibility.

14.1.2 Notice of Anti-Doping Rule Violations to *national anti-doping organizations,* international Federations and *Wada*

The *anti-doping organization* with results management responsibility shall also notify the *athlete's national anti-doping organization*, international Federation and *Wada* of the assertion of an anti-doping rule violation simultaneously with the notice to the *athlete* or other *Person*.

14.1.3 Content of an Anti-Doping Rule Violation Notice

Notification shall include: the *athlete's* name, country, sport and discipline within the sport,

the *athlete's* competitive level, whether the test was *In-Competition* or *out-of-Competition*, the date of *Sample* collection, the analytical result reported by the laboratory and other information as required by the international Standard for Testing and investigations, or, for anti-doping rule violations other than Article 2.1, the rule violated and the basis of the asserted violation.

14.1.4 Status Reports

Except with respect to investigations which have not resulted in notice of an anti-doping rule violation pursuant to Article 14.1.1, the *anti-doping organizations* referenced in Article 14.1.2 shall be regularly updated on the status and findings of any review or proceedings conducted pursuant to Article 7, 8 or 13 and shall be provided with a prompt written reasoned explanation or decision explaining the resolution of the matter.

14.1.5 Confidentiality

The recipient organizations shall not disclose this information beyond those *Persons* with a need to know (which would include the appropriate personnel at the applicable *national olympic Committee*, National Federation, and team in a *team Sport*) until the *anti-doping organization* with results management responsibility has made *Public disclosure* or has failed to make *Public disclosure* as required in Article 14.3.

[Comment to Article 14.1.5: Each Anti-Doping Organization shall provide, in its own anti-doping rules, procedures for the protection of confidential information and for investigating and disciplining improper disclosure of confidential information by any employee or agent of the Anti-Doping Organization.]

14.2 Notice of Anti-Doping Rule Violation Decisions and Request for Files

14.2.1 Anti-doping rule violation decisions rendered pursuant to Article 7.10, 8.4, 10.4, 10.5, 10.6, 10.12.3 or 13.5 shall include the full reasons for thedecision, including, ifapplicable, ajustification for why the maximum potential sanction was not imposed. Where the decision is not in English or French, the *anti-doping organization* shall provide a short English or French summary of the decision and the supporting reasons.

14.2.2 An *anti-doping organization* having a right to appeal a decision received pursuant to Article 14.2.1 may, within 15 days of receipt, request a copy of the full case file pertaining to the decision.

14.3 *Public Disclosure*

14.3.1 The identity of any *athlete* or other *Person* who is asserted by an *anti-doping organization* to have committed an anti-doping rule violation, may be *Publicly disclosed* by the *anti-doping organization* with results management responsibility only after notice has been provided to the *athlete* or other *Person* in accordance with Article 7.3, 7.4, 7.5, 7.6 or 7.7, and to the applicable *anti-doping organizations* in accordance with Article 14.1.2.

14.3.2 No later than twenty days after it has been determined in a final appellate decision under Article 13.2.1 or 13.2.2, or such appeal has been waived, or a hearing in accordance with Article 8 has been waived, or the assertion of an anti-doping rule violation has not otherwise been timely challenged, the *anti-doping organization*

responsible for results management must *Publicly report* the disposition of the anti-doping matter including the sport, the anti-doping rule violated, the name of the *athlete* or other *Person* committing the violation, the *Prohibited Substance* or *Prohibited Method* involved and the *Consequences* imposed. The same *anti-doping organization* must also *Publicly report* within twenty days the results of final appeal decisions concerning anti-doping rule violations, including the information described above.

14.3.3 in any case where it is determined, after a hearing or appeal, that the *athlete* or other *Person* did not commit an anti-doping rule violation, the decision may be *Publicly disclosed* only with the consent of the *athlete* or other *Person* who is the subject of the decision. The *anti-doping organization* with results management responsibility shall use reasonable efforts to obtain such consent, and if consent is obtained, shall *Publicly disclose* the decision in its entirety or in such redacted form as the *athlete* or other *Person* may approve.

14.3.4 Publication shall be accomplished at a minimum by placing the required information on the *anti-doping organization's* website and leaving the information up for the longer of one month or the duration of any period of *Ineligibility*.

14.3.5 No *anti-doping organization* or *Wada*-accredited laboratory, or official of either, shall publicly comment on the specific facts of any pending case (as opposed to general description of process and science) except in response to public comments attributed to the *athlete*, other *Person* or their representatives.

14.3.6 The mandatory *Public reporting* required in 14.3.2 shall not be required where the *athlete* or other *Person* who has been found to have committed an anti-doping rule violation is a *Minor*. Any optional *Public reporting* in a case involving a *Minor* shall be proportionate to the facts and circumstances of the case.

14.4 Statistical Reporting

anti-doping organizations shall, at least annually, publish publicly a general statistical report of their *doping Control* activities, with a copy provided to *Wada. anti-doping organizations* may also publish reports showing the name of each *athlete* tested and the date of each *testing*. *Wada* shall, at least annually, publish statistical reports summarizing the information that it receives from *anti-doping organizations* and laboratories.

14.5 *Doping Control* Information Clearinghouse

Wada shall act as a central clearinghouse for *doping Control testing* data and results, including, in particular, *athlete biological Passport* data for *International-level athletes* and *national-level athletes* and whereabouts information for *athletes* including those in *registered testing Pools*. To facilitate coordinated test distribution planning and to avoid unnecessary duplication in *testing* by various *anti-doping organizations*, each *anti-doping organization* shall report all *In-Competition* and *out-of-Competition* tests on such *athletes* to the *Wada* clearinghouse, using *adaMS* or another system approved by *Wada*, as soon as possible after such tests have been conducted. This information will be made accessible, where appropriate and in accordance with the applicable rules, to the *athlete*, the *athlete's national anti-doping organization* and international Federation, and any other *anti-doping organizations* with *testing* authority over the *athlete*.

To enable it to serve as a clearinghouse for *doping Control testing* data and results management decisions, *Wada* has developed a database management tool, *adaMS*, that reflects data privacy principles. in particular, *Wada* has developed *adaMS* to be consistent with data privacy statutes and norms applicable to *Wada* and other organizations using *adaMS*. Private information regarding an *athlete, athlete Support Personnel,* or others involved in anti-doping activities shall be maintained by *Wada,* which is supervised by Canadian privacy authorities, in strict confidence and in accordance with the international Standard for the Protection of Privacy and Personal information.

14.6 Data Privacy

anti-doping organizations may collect, store, process or disclose personal information relating to *athletes* and other *Persons* where necessary and appropriate to conduct their anti-doping activities under the *Code* and *International Standards* (including specifically the international Standard for the Protection of Privacy and Personal information), and in compliance with applicable law.

[Comment to Article 14.6: Note that Article 22.2 provides that "Each government will put in place legislation, regulation, policies or administrative practices for cooperation and sharing of information with Anti-Doping Organizations and sharing of data among Anti-Doping Organizations as provided in the Code."]

ARTICLE 15 APPLICATION AND RECOGNITION OF DECISIONS

15.1 Subject to the right to appeal provided in Article 13, *testing*, hearing results or other final adjudications of any *Signatory* which are consistent with the *Code* and are within that *Signatory's* authority, shall be applicable worldwide and shall be recognized and respected by all other *Signatories*.

15.2 *Signatories* shall recognize the measures taken by other bodies which have not accepted the *Code* if the rules of those bodies are otherwise consistent with the *Code*.

[Comment to Article 15.1: The extent of recognition of TUE decisions of other Anti-Doping Organizations shall be determined by Article 4.4 and the International Standard for Therapeutic Use Exemptions.]

[Comment to Article 15.2: Where the decision of a body that has not accepted the Code is in some respects Code compliant and in other respects not Code compliant, Signatories should attempt to apply the decision in harmony with the principles of the Code. For example, if in a process consistent with the Code a non-Signatory has found an Athlete to have committed an anti-doping rule violation on account of the presence of a Prohibited Substance in his or her body but the period of Ineligibility applied is shorter than the period provided for in the Code, then all Signatories should recognize the finding of an anti-doping rule violation and the Athlete's National Anti-Doping Organization should conduct a hearing consistent with Article 8 to determine whether the longer period of Ineligibility provided in the Code should be imposed.]

ARTICLE 16 *DOPING CONTROL* FOR ANIMALS COMPETING IN SPORT

16.1 in any sport that includes animals in *Competition*, the international Federation for that sport shall establish and implement anti-doping rules for the animals included in that sport. The anti-doping rules shall include a list of *Prohibited Substances,* appropriate *testing* procedures and a list of approved laboratories for *Sample* analysis.

16.2 With respect to determining anti-doping rule violations, results management, fair hearings, *Consequences*, and appeals for animals involved in sport, the international Federation for that sport shall establish and implement rules that are generally consistent with Articles 1, 2, 3, 9, 10, 11, 13 and 17 of the *Code*.

ARTICLE 17 STATUTE OF LIMITATIONS

No anti-doping rule violation proceeding may be commenced against an *athlete* or other *Person* unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, within ten years from the date the violation is asserted to have occurred.

PART TWO

EDUCATION AND RESEARCH

ARTICLE 18 EDUCATION

18.1 Basic Principle and Primary Goal

The basic principle for information and education programs for doping-free sport is to preserve the spirit of sport, as described in the introduction to the *Code*, from being undermined by doping. The primary goal of such programs is prevention. The objective shall be to prevent the intentional or unintentional *use* by *athletes* of *Prohibited Substances* and *Prohibited Methods*.

information programs should focus on providing basic information to *athletes* as described in Article 18.2. Education programs should focus on prevention. Prevention programs should be values based and directed towards *athletes* and *athlete Support Personnel* with a particular focus on young people through implementation in school curricula.

All *Signatories* shall within their means and scope of responsibility and in cooperation with each other, plan, implement, evaluate and monitor information, education, and prevention programs for doping-free sport.

18.2 Programs and Activities

These programs shall provide *athletes* and other *Persons* with updated and accurate information on at least the following issues:

- Substances and methods on the *Prohibited list*
- Anti-doping rule violations
- *Consequences* of doping, including sanctions, health and social consequences
- *doping Control* procedures
- *athletes*' and *athlete Support Personnel's* rights and responsibilities

- *tues*
- Managing the risks of nutritional supplements
- Harm of doping to the spirit of sport
- Applicable whereabouts requirements

The programs shall promote the spirit of sport in order to establish an environment that is strongly conducive to doping-free sport and will have a positive and long-term influence on the choices made by *athletes* and other *Persons*.

Prevention programs shall be primarily directed at young people, appropriate to their stage of development, in school and sports clubs, parents, adult *athletes*, sport officials, coaches, medical personnel and the media.

athlete Support Personnel shall educate and counsel *athletes* regarding anti-doping policies and rules adopted pursuant to the *Code*.

All *Signatories* shall promote and support active participation by *athletes* and *athlete Support Personnel* in education programs for doping-free sport.

18.3 Professional Codes of Conduct

All *Signatories* shall cooperate with each other and governments to encourage relevant, competent professional associations and institutions to develop and implement appropriate Codes of Conduct, good practice and ethics related to sport practice regarding anti-doping, as well as sanctions, which are consistent with the *Code*.

[Comment to Article 18.2: Anti-doping informational and educational programs should not be limited to National- or International-Level Athletes but should include all Persons, including youth, who participate in sport under the authority of any Signatory, government or other sports organization accepting the Code. (See definition of Athlete.) These programs should also include Athlete Support Personnel.

These principles are consistent with the UNESCO Convention with respect to education and training.]

18.4 Coordination and Cooperation

Wada shall act as a central clearinghouse for informational and educational resources and/or programs developed by *Wada* or *anti-doping organizations*.

All *Signatories* and *athletes* and other *Persons* shall cooperate with each other and governments to coordinate their efforts in anti-doping information and education in order to share experience and ensure the effectiveness of these programs in preventing doping in sport.

ARTICLE 19 RESEARCH

19.1 Purpose and Aims of Anti-Doping Research

Anti-doping research contributes to the development and implementation of efficient programs within *doping Control* and to information and education regarding doping-free sport.

All *Signatories* shall, in cooperation with each other and governments, encourage and promote such research and take all reasonable measures to ensure that the results of such research are used for the promotion of the goals that are consistent with the principles of the *Code*.

19.2 Types of Research

Relevant anti-doping research may include, for example, sociological, behavioral, juridical and ethical studies in addition to medical, analytical and physiological investigation. Studies on devising and evaluating the efficacy of scientifically-based physiological and psychological training programs that are consistent with the principles of the *Code* and respectful of the integrity of the human subjects, as well as studies on the *use* of emerging substances or methods resulting from scientific developments should be conducted.

19.3 Coordination of Research and Sharing of Results

Coordination of anti-doping research through *Wada* is essential. Subject to intellectual property rights, copies of anti-doping research results shall be provided to *Wada* and, where appropriate, shared with relevant *Signatories* and *athletes* and other stakeholders.

19.4 Research Practices

Anti-doping research shall comply with internationally-recognized ethical practices.

19.5 Research Using *Prohibited Substances* and *Prohibited Methods*

Research efforts should avoid the *administration* of *Prohibited Substances* or *Prohibited Methods* to *athletes*.

19.6 Misuse of Results

Adequate precautions should be taken so that the results of anti-doping research are not misused and applied for doping purposes.

PART THREE
ROLES AND RESPONSIBILITIES

All *Signatories* shall act in a spirit of partnership and collaboration in order to ensure the success of the fight against doping in sport and the respect of the *Code*.

[Comment: Responsibilities for Signatories and Athletes or other Persons are addressed in various Articles in the Code and the responsibilities listed in this part are additional to these responsibilities.]

ARTICLE 20 ADDITIONAL ROLES AND RESPONSIBILITIES OF *SIGNATORIES*

20.1 Roles and Responsibilities of the International Olympic Committee

20.1.1 To adopt and implement anti-doping policies and rules for the Olympic games which conform with the *Code*.

20.1.2 To require as a condition of recognition by the international Olympic Committee, that international Federations within the Olympic Movement are in compliance with the *Code*.

20.1.3 To withhold some or all Olympic funding of sport organizations that are not in compliance with the *Code*.

20.1.4 To take appropriate action to discourage non-compliance with the *Code* as provided in Article 23.5.

20.1.5 To authorize and facilitate the *Independent observer Program*.

20.1.6 To require all *athletes* and each *athlete Support Person* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in the Olympic games to agree to be bound by anti-doping rules in conformity with the *Code* as a condition of such participation.

20.1.7 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.1.8 To accept bids for the Olympic games only from countries where the government has ratified, accepted, approved or acceded to the *uneSCo Convention* and the *national olympic Committee,* National Paralympic Committee and *national anti-doping organization* are in compliance with the *Code*.

20.1.9 To promote anti-doping education.

20.1.10 To cooperate with relevant national organizations and agencies and other *anti-doping organizations*.

20.2 Roles and Responsibilities of the International Paralympic Committee

20.2.1 To adopt and implement anti-doping policies and rules for the Paralympic games which conform with the *Code*.

20.2.2 To require as a condition of recognition by the international Paralympic Committee, that National Paralympic Committees within the Paralympic Movement are in compliance with the *Code*.

20.2.3 To withhold some or all Paralympic funding of sport organizations that are not in compliance with the *Code*.

20.2.4 To take appropriate action to discourage non-compliance with the *Code* as provided in Article 23.5.

20.2.5 To authorize and facilitate the *Independent observer Program*.

20.2.6 To require all *athletes* and each *athlete Support Person* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in the Paralympic games to agree to be bound by anti-doping rules in conformity with the *Code* as a condition of such participation.

20.2.7 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.2.8 To promote anti-doping education.

20.2.9 To cooperate with relevant national organizations and agencies and other *anti-doping organizations*.

20.3 Roles and Responsibilities of International Federations

20.3.1 To adopt and implement anti-doping policies and rules which conform with the *Code*.

20.3.2 To require as a condition of membership that the policies, rules and programs of their National Federations and other members are in compliance with the *Code*.

20.3.3 To require all *athletes* and each *athlete Support Person* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a *Competition* or activity authorized or organized by the International Federation or one of its member organizations to agree to be bound by anti-doping rules in conformity with the *Code* as a condition of such participation.

20.3.4 To require *athletes* who are not regular members of the international Federation or one of its member National Federations to be available for *Sample* collection and to provide accurate and up-to-date whereabouts information as part of the international Federation's *registered testing Pool* consistent with the conditions for eligibility established by the international Federation or, as applicable, the *Major event organization*.

20.3.5 To require each of its National Federations to establish rules requiring all *athletes* and each *athlete Support Person* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in a *Competition* or activity authorized or organized by a National Federation or one of its member organizations to agree to be bound by anti-doping rules and *anti-doping organization* results management authority in conformity with the *Code* as a condition of such participation.

20.3.6 To require National Federations to report any information suggesting or relating to an anti-doping rule violation to their *national anti-doping organization* and international Federation and to cooperate with investigations conducted by any *anti-doping organization* with authority to conduct the investigation.

20.3.7 To take appropriate action to discourage non-compliance with the *Code* as provided in Article 23.5.

[Comment to Article 20.3.4: This would include, for example, Athletes from professional leagues.]

20.3.8 To authorize and facilitate the *Independent observer Program* at *International events*.

20.3.9 To withhold some or all funding to its member National Federations that are not in compliance with the *Code*.

20.3.10 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping, to ensure proper enforcement of *Consequences*, and to conduct an automatic investigation of *athlete Support Personnel* in the case of any anti-doping rule violation involving a *Minor* or *athlete Support Person* who has provided support to more than one *athlete* found to have committed an anti-doping rule violation.

20.3.11 To do everything possible to award World Championships only to countries where the government has ratified, accepted, approved or acceded to the *uneSCo Convention* and the *national olympic Committee*, National Paralympic Committee and *national anti-doping organization* are in compliance with the *Code*.

20.3.12 To promote anti-doping education, including requiring National Federations to conduct anti-doping education in coordination with the applicable *national anti-doping organization*.

20.3.13 To cooperate with relevant national organizations and agencies and other *anti-doping organizations*.

20.3.14 To cooperate fully with *Wada* in connection with investigations conducted by *Wada* pursuant to Article 20.7.10.

20.3.15 To have disciplinary rules in place and require National Federations to have disciplinary rules in place to prevent *athlete Support Personnel* who are *using Prohibited Substances* or *Prohibited Methods* without valid justification from providing support to *athletes* within the international Federation's or National Federation's authority.

20.4 Roles and Responsibilities of *National Olympic Committees* and National Paralympic Committees

20.4.1 To ensure that their anti-doping policies and rules conform with the *Code*.

20.4.2 To require as a condition of membership or recognition that National Federations' anti-doping policies and rules are in compliance with the applicable provisions of the *Code*.

20.4.3 To respect the autonomy of the *national anti-doping organization* in its country and not to interfere in its operational decisions and activities.

20.4.4 To require National Federations to report any information suggesting or relating to an anti-doping rule violation to their *national anti-doping organization* and international Federation and to cooperate with investigations conducted by any *anti-doping organization* with authority to conduct the investigation.

20.4.5 To require as a condition of participation in the Olympic games and Paralympic games that, at a minimum, *athletes* who are not regular members of a National Federation be available

for *Sample* collection and to provide whereabouts information as required by the international Standard for Testing and investigations as soon as the *athlete* is identified on the long list or subsequent entry document submitted in connection with the Olympic games or Paralympic games.

20.4.6 To cooperate with their *national anti-doping organization* and to work with their government to establish a *national anti-doping organization* where one does not already exist, provided that in the interim, the *national olympic Committee* or its designee shall fulfill the responsibility of a *national anti-doping organization*.

20.4.6.1 For those countries that are members of a *regional anti-doping organization*, the *national olympic Committee*, in cooperation with the government, shall maintain an active and supportive role with their respective *regional anti-doping organizations*.

20.4.7 To require each of its National Federations to establish rules requiring each *athlete Support Person* who participates as a coach, trainer, manager, team staff, official, medical or para-medical personnel in a *Competition* or activity authorized or organized by a National Federation or one of its member organizations to agree to be bound by anti-doping rules and *anti-doping organization* results management authority in conformity with the *Code* as a condition of such participation.

20.4.8 To withhold some or all funding, during any period of his or her *Ineligibility*, to any *athlete* or *athlete Support Person* who has violated anti-doping rules.

20.4.9 To withhold some or all funding to its member or recognized National Federations that are not in compliance with the *Code*.

20.4.10 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.4.11 To promote anti-doping education, including requiring National Federations to conduct anti-doping education in coordination with the applicable *national anti-doping organization*.

20.4.12 To cooperate with relevant national organizations and agencies and other *anti-doping organizations*.

20.4.13 To have disciplinary rules in place to prevent *athlete Support Personnel* who are *using Prohibited Substances* or *Prohibited Methods* without valid justification from providing support to *athletes* within the *national olympic Committee's* or National Paralympic Committee's authority.

20.5 Roles and Responsibilities of *National Anti-Doping Organizations*

20.5.1 To be independent in their operational decisions and activities.

20.5.2 To adopt and implement anti-doping rules and policies which conform with the *Code*.

20.5.3 To cooperate with other relevant national organizations and agencies and other *anti-doping organizations*.

20.5.4 To encourage reciprocal *testing* between *national anti-doping organizations*.

20.5.5 To promote anti-doping research.

20.5.6 Where funding is provided, to withhold some or all funding, during any period of his or her *Ineligibility*, to any *athlete* or *athlete Support Person* who has violated anti-doping rules.

20.5.7 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping and to ensure proper enforcement of *Consequences*.

20.5.8 To promote anti-doping education.

20.5.9 To conduct an automatic investigation of *athlete Support Personnel* within its jurisdiction in the case of any anti-doping rule violation by a *Minor* and to conduct an automatic investigation of any *athlete Support Person* who has provided support to more than one *athlete* found to have committed an anti-doping rule violation.

20.5.10 To cooperate fully with *Wada* in connection with investigations conducted by *Wada* pursuant to Article 20.7.10.

[Comment to Article 20.5: For some smaller countries, a number of the responsibilities described in this Article may be delegated by their National Anti-Doping Organization to a Regional Anti-Doping Organization.]

20.6 Roles and Responsibilities of *Major Event Organizations*

20.6.1 To adopt and implement anti-doping policies and rules for their *events* which conform with the *Code*.

20.6.2 To take appropriate action to discourage non-compliance with the *Code* as provided in Article 23.5.

20.6.3 To authorize and facilitate the *Independent observer Program*.

20.6.4 To require all *athletes* and each *athlete Support Person* who participates as coach, trainer, manager, team staff, official, medical or paramedical personnel in the *event* to agree to be bound by anti-doping rules in conformity with the *Code* as a condition of such participation.

20.6.5 To vigorously pursue all potential anti-doping rule violations within its jurisdiction including investigation into whether *athlete Support Personnel* or other *Persons* may have been involved in each case of doping.

20.6.6 To do everything possible to award *events* only to countries where the government has ratified, accepted, approved or acceded to the *uneSCo Convention* and the *national olympic Committee*, National Paralympic Committee and *national anti-doping organization* are in compliance with the *Code*.

20.6.7 To promote anti-doping education.

20.6.8 To cooperate with relevant national organizations and agencies and other *anti-doping organizations*.

20.7 Roles and Responsibilities of *WADA*

20.7.1 To adopt and implement policies and procedures which conform with the *Code*.

20.7.2 To monitor *Code* compliance by *Signatories*.

20.7.3 To approve *International Standards* applicable to the implementation of the *Code*.

20.7.4 To accredit and reaccredit laboratories to conduct *Sample* analysis or to approve others to conduct *Sample* analysis.

20.7.5 To develop and publish guidelines and models of best practice.

20.7.6 To promote, conduct, commission, fund and coordinate anti-doping research and to promote anti-doping education.

20.7.7 To design and conduct an effective *Independent observer Program* and other types of *event* advisory programs.

20.7.8 To conduct, in exceptional circumstances and at the direction of the *Wada* Director general, *doping Controls* on its own initiative or as requested by other *anti-doping organizations*, and to cooperate with relevant national and international organizations and agencies, including but not limited to, facilitating inquiries and investigations.

20.7.9 To approve, in consultation with international Federations, *national anti-doping organizations,* and *Major event organizations,* defined *testing* and *Sample* analysis programs.

20.7.10 To initiate its own investigations of anti-doping rule violations and other activities that may facilitate doping.

[Comment to Article 20.7.8: WADA is not a Testing agency, but it reserves the right, in exceptional circumstances, to conduct its own tests where problems have been brought to the attention of the relevant Anti-Doping Organization and have not been satisfactorily addressed.]

ARTICLE 21 ADDITIONAL ROLES AND RESPONSIBILITIES OF *ATHLETES* AND OTHER *PERSONS*

21.1 Roles and Responsibilities of *Athletes*

21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the *Code*.

21.1.2 To be available for *Sample* collection at all times.

21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and *use*.

21.1.4 To inform medical personnel of their obligation not to *use Prohibited Substances* and *Prohibited Methods* and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the *Code*.

21.1.5 To disclose to their *national anti-doping organization* and international Federation any decision by a non-*Signatory* finding that the *athlete* committed an anti-doping rule violation within the previous ten years.

21.1.6 To cooperate with *anti-doping organizations* investigating anti-doping rule violations.

[Comment to Article 21.1.2: With due regard to an Athlete's human rights and privacy, legitimate anti-doping considerations sometimes require Sample collection late at night or early in the morning. For example, it is known that some Athletes Use low doses of EPO during these hours so that it will be undetectable in the morning.]

[Comment to Article 21.1.6 Failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a stakeholder's rules.]

21.2 Roles and Responsibilities of *Athlete Support Personnel*

21.2.1 To be knowledgeable of and comply with all anti-doping policies and rules adopted pursuant to the *Code* and which are applicable to them or the *athletes* whom they support.

21.2.2 To cooperate with the *athlete testing* program.

21.2.3 To use his or her influence on *athlete* values and behavior to foster anti-doping attitudes.

21.2.4 To disclose to his or her *national anti-doping organization* and international Federation any decision by a non-*Signatory* finding that he or she committed an anti-doping rule violation within the previous ten years.

21.2.5 To cooperate with *anti-doping organizations* investigating anti-doping rule violations.

21.2.6 *athlete Support Personnel* shall not *use* or *Possess* any *Prohibited Substance* or *Prohibited Method* without valid justification.

[Comment to Article 21.2.5 Failure to cooperate is not an anti-doping rule violation under the Code, but it may be the basis for disciplinary action under a stakeholder's rules.]

[Comment to Article 21.2.6: In those situations where Use or personal Possession of a Prohibited Substance or Prohibited Method by an Athlete Support Person without justification is not an anti-doping rule violation under the Code, it should be subject to other sport disciplinary rules. Coaches and other Athlete Support Personnel are often role models for Athletes. They should not be engaging in personal conduct which conflicts with their responsibility to encourage their Athletes not to dope.]

21.3 Roles and Responsibilities of *Regional Anti-Doping Organizations*

21.3.1 To ensure member countries adopt and implement rules, policies and programs which conform with the *Code.*

21.3.2 To require as a condition of membership that a member country sign an official *regional anti-doping organization* membership form which clearly outlines the delegation of anti-doping responsibilities to the *regional anti-doping organization.*

21.3.3 To cooperate with other relevant national and regional organizations and agencies and other *anti-doping organizations.*

21.3.4 To encourage reciprocal *testing* between *national anti-doping organizations* and *regional anti-doping organizations.*

21.3.5 To promote anti-doping research.

21.3.6 To promote anti-doping education.

ARTICLE 22 INVOLVEMENT OF GOVERNMENTS

Each government's commitment to the *Code* will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of 3 March 2003, and by ratifying, accepting, approving or acceding to the *uneSCo Convention*. The following Articles set forth the expectations of the *Signatories*.

22.1 Each government will take all actions and measures necessary to comply with the *uneSCo Convention.*

22.2 Each government will put in place legislation, regulation, policies or administrative practices for cooperation and sharing of information with *anti-doping organizations* and sharing of data among *anti-doping organizations* as provided in the *Code*.

22.3 Each government will encourage cooperation between all of its public services or agencies and *anti-doping organizations* to timely share information with *anti-doping organizations* which would be useful in the fight against doping and where to do so would not otherwise be legally prohibited.

22.4 Each government will respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law.

22.5 Each government that does not have a *national anti-doping organization* in its country will work with its *national olympic Committee* to establish one.

22.6 Each government will respect the autonomy of a *national anti-doping organization* in its country and not interfere in its operational decisions and activities.

22.7 A government should meet the expectations of Article 22.2 no later than 1 January 2016. The other sections of this Article should already have been met.

22.8 Failure by a government to ratify, accept, approve or accede to the *uneSCo Convention,* or to comply with the *uneSCo Convention* thereafter may result in ineligibility to bid for *events* as provided in Articles 20.1.8, 20.3.11, and 20.6.6 and may result in additional consequences, e.g., forfeiture of offices and positions within *Wada*; ineligibility or non-admission of any candidature to hold any *International event* in a country, cancellation of *International events*; symbolic consequences and other consequences pursuant to the Olympic Charter.

[Comment to Article 22: Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code. For that reason, governments are not asked to be Signatories to the Code but rather to sign the Copenhagen Declaration and ratify, accept, approve or accede to the UNESCO Convention. Although the acceptance mechanisms may be different, the effort to combat doping through the coordinated and harmonized program reflected in the Code is very much a joint effort between the sport movement and governments.

This Article sets forth what the Signatories clearly expect from governments. However, these are simply "expectations" since governments are only "obligated" to adhere to the requirements of the UNESCO Convention.]

PART FOUR

ACCEPTANCE, COMPLIANCE, MODIFICATION AND INTERPRETATION

ARTICLE 23 ACCEPTANCE, COMPLIANCE AND MODIFICATION

23.1 Acceptance of the *Code*

23.1.1 The following entities shall be *Signatories* accepting the *Code*: *Wada*, the international Olympic Committee, international Federations, the international Paralympic Committee, *national olympic Committees*, National Paralympic Committees, *Major event organizations*, and *national anti-doping organizations*. These entities shall accept the *Code* by signing a declaration of acceptance upon approval by each of their respective governing bodies.

23.1.2 Other sport organizations that may not be under the control of a *Signatory* may, upon *Wada's* invitation, also become a *Signatory* by accepting the *Code*.

23.1.3 A list of all acceptances will be made public by *Wada*.

[Comment to Article 23.1.1: Each accepting Signatory will separately sign an identical copy of the standard form common declaration of acceptance and deliver it to WADA. The act of acceptance will be as authorized by the organic documents of each organization. For example, an International Federation by its Congress and WADA by its Foundation Board.]

[Comment to Article 23.1.2: Those professional leagues that are not currently under the jurisdiction of any government or International Federation will be encouraged to accept the Code.]

23.2 Implementation of the *Code*

23.2.1 The *Signatories* shall implement applicable *Code* provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.

23.2.2 The following Articles as applicable to the scope of the anti-doping activity which the *anti-doping organization* performs must be implemented by *Signatories* without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.):

- Article 1 (Definition of Doping)
- Article 2 (Anti-Doping Rule Violations)
- Article 3 (Proof of Doping)
- Article 4.2.2 (*Specified Substances*)
- Article 4.3.3 (*Wada's* Determination of the *Prohibited list*)
- Article 7.11 (Retirement from Sport)
- Article 9 (Automatic *disqualification* of individual Results)
- Article 10 (Sanctions on Individuals)
- Article 11 (*Consequences* to Teams)
- Article 13 (Appeals) with the exception of 13.2.2, 13.6, and 13.7
- Article 15.1 (Recognition of Decisions)
- Article 17 (Statute of Limitations)
- Article 24 (Interpretation of the *Code*)
- Appendix 1 - Definitions

No additional provision may be added to a *Signatory's* rules which changes the effect of the Articles enumerated in this Article. A *Signatory's* rules must expressly acknowledge the Commentary of the *Code* and endow the Commentary with the same status that it has in the *Code*.

23.2.3 in implementing the *Code*, the *Signatories* are encouraged to use the models of best practice recommended by *Wada*.

23.3 Implementation of Anti-Doping Programs

Signatories shall devote sufficient resources in order to implement anti-doping programs in all areas that are compliant with the *Code* and the *International Standards*.

23.4 Compliance with the *Code*

Signatories shall not be considered in compliance with the *Code* until they have accepted and implemented the *Code* in accordance with Articles 23.1, 23.2, and 23.3. They shall no longer be considered in compliance once acceptance has been withdrawn.

[Comment to Article 23.2.2: Nothing in the Code precludes an Anti-Doping Organization from adopting and enforcing its own specific disciplinary rules for conduct by Athlete Support Personnel related to doping but which does not, in and of itself, constitute an anti-doping rule violation under the Code. For example, a National or International Federation could refuse to renew the license of a coach when multiple Athletes have committed anti-doping rule violations while under that coach's supervision.]

23.5 Monitoring Compliance with the *Code* and *UNESCO Convention*

23.5.1 Compliance with the *Code* shall be monitored by *Wada* or as otherwise agreed by *Wada*. Compliance of anti-doping programs as required in Article 23.3 shall be monitored based on criteria specified by the *Wada* Executive Committee. Compliance with the commitments reflected in the *UNESCO Convention* will be monitored as determined by the Conference of Parties to the *UNESCO Convention*, following consultation with the State Parties and *Wada*. *Wada* shall advise governments on the implementation of the *Code* by the *Signatories* and shall advise *Signatories* on the ratification, acceptance, approval or accession to the *UNESCO Convention* by governments.

23.5.2 To facilitate monitoring, each *Signatory* shall report to *Wada* on its compliance with the *Code* as required by the *Wada* Foundation Board and shall explain reasons for non-compliance.

23.5.3 Failure by a *Signatory* to provide compliance information requested by *Wada* for purposes of Article 23.5.2, or failure by a *Signatory* to submit information to *Wada* as required by other Articles of the *Code*, may be considered non-compliance with the *Code.*

23.5.4 All *Wada* compliance reports shall be approved by the *Wada* Foundation Board. *Wada* shall dialog with a *Signatory* before reporting that *Signatory* non-compliant. Any *Wada* report which concludes that a *Signatory* is non-compliant must be approved by the *Wada* Foundation Board at a meeting held after the *Signatory* has been given an opportunity to submit its written arguments to the Foundation Board. The conclusion by the *Wada* Foundation Board that a *Signatory* is non-compliant may be appealed pursuant to Article 13.6.

23.5.5 *Wada* shall make reports on compliance to the international Olympic Committee, the international Paralympic Committee, international Federations, and *Major event organizations*. These reports shall also be made available to the public.

23.5.6 *Wada* shall consider explanations for non-compliance and, in extraordinary situations, may recommend to the international Olympic Committee, international Paralympic Committee, international Federations, and *Major event organizations* that they provisionally excuse the non-compliance.

23.6 Additional Consequences of a *Signatory's* Non-compliance with the *Code*

Non-compliance with the *Code* by any *Signatory* may result in consequences in addition to ineligibility to bid for *events* as set forth in Articles 20.1.8 (international Olympic Committee), 20.3.11 (international Federations) and 20.6.6 (*Major event organizations*), for example: forfeiture of offices and positions within *Wada*; *Ineligibility* or non-admission of any candidature to hold any *International event* in a country; cancellation of *International events*; symbolic consequences and other consequences pursuant to the Olympic Charter.

The imposition of such consequences may be appealed to *CaS* by the affected *Signatory* pursuant to Article 13.6.

[Comment to Article 23.5.6: WADA recognizes that amongst Signatories and governments, there will be significant differences in anti-doping experience, resources, and the legal context in which anti-doping activities are carried out. In considering whether an organization is compliant, WADA will consider these differences.]

23.7 Modification of the *Code*

23.7.1 *Wada* shall be responsible for overseeing the evolution and improvement of the *Code*. *athletes* and other stakeholders and governments shall be invited to participate in such process.

23.7.2 *Wada* shall initiate proposed amendments to the *Code* and shall ensure a consultative process to both receive and respond to recommendations and to facilitate review and feedback from *athletes* and other stakeholders and governments on recommended amendments.

23.7.3 Amendments to the *Code* shall, after appropriate consultation, be approved by a two-thirds majority of the *Wada* Foundation Board including a majority of both the public sector and Olympic Movement members casting votes. Amendments shall, unless provided otherwise, go into effect three months after such approval.

23.7.4 *Signatories* shall modify their rules to incorporate the 2015 *Code* on or before 1 January 2015, to take effect on 1 January 2015. *Signatories* shall implement any subsequent applicable amendment to the *Code* within one year of approval by the *Wada* Foundation Board.

23.8 Withdrawal of Acceptance of the *Code*

Signatories may withdraw acceptance of the *Code* after providing *Wada* six-month written notice of their intent to withdraw.

ARTICLE 24 INTERPRETATION OF THE *CODE*

24.1 The official text of the *Code* shall be maintained by *Wada* and shall be published in English and French. in the event of any conflict between the English and French versions, the English version shall prevail.

24.2 The comments annotating various provisions of the *Code* shall be used to interpret the *Code*.

24.3 The *Code* shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the *Signatories* or governments.

24.4 The headings used for the various Parts and Articles of the *Code* are for convenience only and shall not be deemed part of the substance of the *Code* or to affect in any way the language of the provisions to which they refer.

24.5 The *Code* shall not apply retroactively to matters pending before the date the *Code* is accepted by a *Signatory* and implemented in its rules. However, pre-*Code* anti-doping rule violations would continue to count as "First violations" or "Second violations" for purposes of determining sanctions under Article 10 for subsequent post-*Code* violations.

24.6 The Purpose, Scope and Organization of the World Anti-Doping Program and the *Code* and Appendix 1, Definitions and Appendix 2, Examples of the Application of Article 10, shall be considered integral parts of the *Code*.

ARTICLE 25 TRANSITIONAL PROVISIONS

25.1 General Application of the 2015 *Code*

The 2015 *Code* shall apply in full as of 1 January 2015 (the "Effective Date").

25.2 Non-Retroactive except for Articles 10.7.5 and 17 or Unless Principle of "Lex Mitior" Applies

The retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall only be applied retroactively if the statute of limitation period has not already expired by the Effective Date. Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case.

25.3 Application to Decisions Rendered Prior to the 2015 *Code*

With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the *athlete* or other *Person* is still serving the period of *Ineligibility* as of the Effective Date, the *athlete* or other *Person* may apply to the *anti-doping organization* which had results management

responsibility for the anti-doping rule violation to consider a reduction in the period of *Ineligibility* in light of the 2015 *Code*. Such application must be made before the period of *Ineligibility* has expired. The decision rendered by the *anti-doping organization* may be appealed pursuant to Article 13.2. The 2015 *Code* shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of *Ineligibility* has expired.

25.4 Multiple Violations Where the First Violation Occurs Prior to 1 January 2015

For purposes of assessing the period of *Ineligibility* for a second violation under Article 10.7.1, where the sanction for the first violation was determined based on pre-2015 *Code* rules, the period of *Ineligibility* which would have been assessed for that first violation had 2015 *Code* rules been applicable, shall be applied.

25.5 Additional *Code* Amendments

Any additional *Code* Amendments shall go into effect as provided in Article 23.7.

[Comment to Article 25.4: Other than the situation described in Article 25.4, where a final decision finding an anti-doping rule violation has been rendered prior to the existence of the Code or under the Code in force before the 2015 Code and the period of Ineligibility imposed has been completely served, the 2015 Code may not be used to re-characterize the prior violation.]

APPENDIX ONE
DEFINITIONS

DEFINITIONS

ADAMS: The Anti-Doping Administration and Management System is a Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and *Wada* in their anti-doping operations in conjunction with data protection legislation.

Administration: Providing, supplying, supervising, facilitating, or otherwise participating in the *use* or *attempted use* by another *Person* of a *Prohibited Substance* or *Prohibited Method*. However, this definition shall not include the actions of bona fide medical personnel involving a *Prohibited Substance* or *Prohibited Method* used for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving *Prohibited Substances* which are not prohibited in *out-of-Competition testing* unless the circumstances as a whole demonstrate that such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

Adverse Analytical Finding: A report from a *Wada*-accredited laboratory or other *Wada*-approved laboratory that, consistent with the international Standard for Laboratories and related Technical Documents, identifies in a *Sample* the presence of a *Prohibited Substance* or its *Metabolites* or *Markers* (including elevated quantities of endogenous substances) or evidence of the *use* of a *Prohibited Method*.

Adverse Passport Finding: A report identified as an *adverse Passport finding* as described in the applicable *International Standards*.

Anti-Doping Organization: A *Signatory* that is responsible for adopting rules for initiating, implementing or enforcing any part of the *doping Control* process. This includes, for example, the international Olympic Committee, the international Paralympic Committee, other *Major event organizations* that conduct *testing* at their *events*, *Wada*, international Federations, and *national anti-doping organizations.*

Athlete: Any *Person* who competes in sport at the international level (as defined by each international Federation) or the national level (as defined by each *national anti-doping organization).* An *anti-doping organization* has discretion to apply anti-doping rules to an *athlete* who is neither an *International-level athlete* nor a *national-level athlete*, and thus to bring them within the definition of "Athlete." in relation to *athletes* who are neither *International-level* nor *national-level athletes*, an *anti-doping organization* may elect to: conduct limited *testing* or no *testing* at all; analyze *Samples* for less than the full menu of *Prohibited Substances*; require limited or no whereabouts information; or not require advance *tues*. However, if an Article 2.1, 2.3 or 2.5 anti-doping rule violation is committed by any *athlete* over whom an *anti-doping organization* has authority who competes below the international or national level, then the *Consequences* set forth in the *Code* (except Article 14.3.2) must be applied. For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any *Person* who participates in sport under the authority of any *Signatory*, government, or other sports organization accepting the *Code* is an *athlete*.

[Comment to Athlete: This definition makes it clear that all International- and National-Level Athletes are subject to the anti-doping rules of the Code, with the precise definitions of international- and national-level sport to be set forth in the anti-doping rules of the International Federations and National Anti-Doping Organizations, respectively. The definition also allows each National Anti-Doping Organization, if it chooses to do so, to expand its anti-doping program beyond International- or National-Level Athletes to competitors at lower levels of Competition or to individuals who engage in fitness activities but do not compete at all. Thus, a National Anti-Doping Organization could, for example, elect to test recreational-level competitors but not require advance TUEs. But an anti-doping rule violation involving an Adverse Analytical Finding or Tampering results in all of the Consequences provided for in the Code (with the exception of Article 14.3.2). The decision on whether Consequences apply to recreational-level Athletes who engage in fitness activities but never compete is left to the National Anti-Doping Organization. In the same manner, a Major Event Organization holding an Event only for masters-level competitors could elect to test the competitors but not analyze Samples for the full menu of Prohibited Substances. Competitors at all levels of Competition should receive the benefit of anti-doping information and education.]

Athlete Biological Passport: The program and methods of gathering and collating data as described in the international Standard for Testing and investigations and international Standard for Laboratories.

Athlete Support Personnel: Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other *Person* working with, treating or assisting an *athlete* participating in or preparing for sports *Competition*.

Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an *attempt* to commit a violation if the *Person* renounces the *attempt* prior to it being discovered by a third party not involved in the *attempt*.

Atypical Finding: A report from a *Wada*-accredited laboratory or other *Wada*-approved laboratory which requires further investigation as provided by the international Standard for Laboratories or related Technical Documents prior to the determination of an *adverse analytical finding*.

Atypical Passport Finding: A report described as an *atypical Passport finding* as described in the applicable *International Standards.*

CAS: The Court of Arbitration for Sport.

Code: The World Anti-Doping Code.

Competition: A single race, match, game or singular sport contest. For example, a basketball game or the finals of the

Olympic 100-meter race in athletics. For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a *Competition* and an *event* will be as provided in the rules of the applicable international Federation.

Consequences of Anti-Doping Rule Violations ("Consequences"): An *athlete's* or other *Person's* violation of an anti-doping rule may result in one or more of the following: (a) *disqualification* means the *athlete's* results in a particular *Competition* or *event* are invalidated, with all resulting *Consequences* including forfeiture of any medals, points and prizes; (b) *Ineligibility* means the *athlete* or other *Person* is barred on account of an anti-doping rule violation for a specified period of time from participating in any *Competition* or other activity or funding as provided in Article 10.12.1; (c) *Provisional Suspension* means the *athlete* or other *Person* is barred temporarily from participating in any *Competition* or activity prior to the final decision at a hearing conducted under Article 8; (d) *financial Consequences* means a financial sanction imposed for an anti-doping rule violation or to recover costs associated with an anti-doping rule violation; and (e) *Public disclosure or Public reporting* means the dissemination or distribution of information to the general public or *Persons* beyond those *Persons* entitled to earlier notification in accordance with Article 14. Teams in *team Sports* may also be subject to *Consequences* as provided in Article 11.

Contaminated Product: A product that contains a *Prohibited Substance* that is not disclosed on the product label or in information available in a reasonable internet search.

Disqualification: See *Consequences of anti-doping rule violations* above.

Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, *Sample* collection and handling, laboratory analysis, *tues*, results management and hearings.

Event: A series of individual *Competition*s conducted together under one ruling body (e.g., the Olympic games, FiNA World Championships, or Pan American games).

Event Venues: Those venues so designated by the ruling body for the *event*.

Event Period: The time between the beginning and end of an *event*, as established by the ruling body of the *event*.

Fault: fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *athlete* or other *Person's* degree of *fault* include, for example, the *athlete's* or other *Person's* experience, whether the *athlete* or other *Person* is a *Minor*, special considerations such as impairment, the degree of risk that should have been perceived by the *athlete* and the level of care and investigation exercised by the *athlete* in relation to what should have been the perceived level of risk. in assessing the *athlete's* or other *Person's* degree of *fault*, the circumstances considered must be specific and relevant to explain the *athlete's* or other *Person's* departure from the expected standard of behavior. Thus, for example, the fact that an *athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility,* or the fact that the *athlete* only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.5.1 or 10.5.2.

[Comment to Fault: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

Financial Consequences: See *Consequences of anti-doping rule violations* above.

In-Competition: Unless provided otherwise in the rules of an international Federation or the ruling body of the *event* in question, "*In-Competition"* means the period commencing twelve hours before a *Competition* in which the *athlete* is scheduled to participate through the end of such *Competition* and the *Sample* collection process related to such *Competition*.

Independent Observer Program: A team of observers, under the supervision of *Wada*, who observe and provide guidance on the *doping Control* process at certain *events* and report on their observations.

Individual Sport: Any sport that is not a *team Sport*.

Ineligibility: See *Consequences of anti-doping rule violations* above.

International Event: An *event* or *Competition* where the international Olympic Committee, the international Paralympic Committee, an international Federation, a *Major event organization,* or another international sport organization is the ruling body for the *event* or appoints the technical officials for the *event.*

[Comment to In-Competition: An International Federation or ruling body for an Event may establish an "In-Competition" period that is different than the Event Period.]

International-Level Athlete: athletes who compete in sport at the international level, as defined by each international Federation, consistent with the international Standard for Testing and investigations.

International Standard: A standard adopted by *Wada* in support of the *Code*. Compliance with an *International Standard* (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the *International Standard* were performed properly. *International Standards* shall include any Technical Documents issued pursuant to the *International Standard.*

Major Event Organizations: The continental associations of *national olympic Committees* and other international multi-sport organizations that function as the ruling body for any continental, regional or other *International event*.

Marker: A compound, group of compounds or biological variable(s) that indicates the *use* of a *Prohibited Substance* or *Prohibited Method.*

Metabolite: Any substance produced by a biotransformation process.

Minor: A natural *Person* who has not reached the age of eighteen years.

[Comment to International-Level Athlete: Consistent with the International Standard for Testing and Investigations, the International Federation is free to determine the criteria it will use to classify Athletes as International-Level Athletes, e.g., by ranking, by participation in particular International Events, by type of license, etc. However, it must publish those criteria in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes. For example, if the criteria include participation in certain International Events, then the International Federation must publish a list of those International Events.]

National Anti-Doping Organization: The entity(ies) designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of *Samples*, the management of test results, and the conduct of hearings at the national level. if this designation has not been made by the competent public authority(ies), the entity shall be the country's *national olympic Committee* or its designee.

National Event: A sport *event* or *Competition* involving *International*- or *national-level athletes* that is not an *International event*.

National-Level Athlete: athletes who compete in sport at the national level, as defined by each *national anti-doping organization,* consistent with the international Standard for Testing and investigations.

National Olympic Committee: The organization recognized by the international Olympic Committee. The term *national olympic Committee* shall also include the National Sport Confederation in those countries where the National Sport Confederation assumes typical *national olympic Committee* responsibilities in the anti-doping area.

No Fault or Negligence: The *athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor*, for any violation of Article 2.1, the *athlete* must also establish how the *Prohibited Substance* entered his or her system.

No Significant Fault or Negligence: The *athlete* or other *Person's* establishing that his or her *fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *no fault or negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Article 2.1, the *athlete* must also establish how the *Prohibited Substance* entered his or her system.

Out-of-Competition: Any period which is not *In-Competition*.

Participant: Any *athlete* or *athlete Support Person*.

Person: A natural *Person* or an organization or other entity.

Possession: The actual, physical *Possession*, or the constructive *Possession* (which shall be found only if the *Person* has exclusive control or intends to exercise control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists); provided, however, that if the *Person* does not have exclusive control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists, constructive *Possession* shall only be found if the *Person* knew about the presence of the *Prohibited Substance* or *Prohibited Method* and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on *Possession* if, prior to receiving notification of any kind that the *Person* has committed an anti-doping rule violation, the *Person* has taken concrete action demonstrating that the *Person* never intended to have *Possession* and has

[Comment to No Significant Fault or Negligence: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]

renounced *Possession* by explicitly declaring it to an *anti-doping organization*. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a *Prohibited Substance* or *Prohibited Method* constitutes *Possession* by the *Person* who makes the purchase.

Prohibited List: The List identifying the *Prohibited Substances* and *Prohibited Methods*.

Prohibited Method: Any method so described on the *Prohibited list*.

Prohibited Substance: Any substance, or class of substances, so described on the *Prohibited list*.

Provisional Hearing: For purposes of Article 7.9, an expedited abbreviated hearing occurring prior to a hearing under Article 8 that provides the *athlete* with notice and an opportunity to be heard in either written or oral form.

[Comment to Possession: Under this definition, steroids found in an Athlete's car would constitute a violation unless the Athlete establishes that someone else used the car; in that event, the Anti-Doping Organization must establish that, even though the Athlete did not have exclusive control over the car, the Athlete knew about the steroids and intended to have control over the steroids. Similarly, in the example of steroids found in a home medicine cabinet under the joint control of an Athlete and spouse, the Anti-Doping Organization must establish that the Athlete knew the steroids were in the cabinet and that the Athlete intended to exercise control over the steroids. The act of purchasing a Prohibited Substance alone constitutes Possession, even where, for example, the product does not arrive, is received by someone else, or is sent to a third party address.]

[Comment to Provisional Hearing: A Provisional Hearing is only a preliminary proceeding which may not involve a full review of the facts of the case. Following a Provisional Hearing, the Athlete remains entitled to a subsequent full hearing on the merits of the case. By contrast, an "expedited hearing," as that term is used in Article 7.9, is a full hearing on the merits conducted on an expedited time schedule.]

Provisional Suspension: See *Consequences of anti-doping rule violations* above.

Publicly Disclose or Publicly Report: See *Consequences of anti-doping rule violations* above.

Regional Anti-Doping Organization: A regional entity designated by member countries to coordinate and manage delegated areas of their national anti-doping programs, which may include the adoption and implementation of anti-doping rules, the planning and collection of *Samples*, the management of results, the review of *tues*, the conduct of hearings, and the conduct of educational programs at a regional level.

Registered Testing Pool: The pool of highest-priority *athletes* established separately at the international level by international Federations and at the national level by *national anti-doping organizations,* who are subject to focused *In-Competition* and *out-of-Competition testing* as part of that international Federation's or *national anti-doping organization's* test distribution plan and therefore are required to provide whereabouts information as provided in Article 5.6 and the international Standard for Testing and investigations.

Sample or *Specimen:* Any biological material collected for the purposes of *doping Control*.

Signatories: Those entities signing the *Code* and agreeing to comply with the *Code*, as provided in Article 23.

Specified Substance: See Article 4.2.2.

[Comment to Sample or Specimen: It has sometimes been claimed that the collection of blood Samples violates the tenets of certain religious or cultural groups. It has been determined that there is no basis for any such claim.]

Strict Liability: The rule which provides that under Article 2.1 and Article 2.2, it is not necessary that intent, *fault*, negligence, or knowing *use* on the *athlete's* part be demonstrated by the *anti-doping organization* in order to establish an anti-doping rule violation.

Substantial Assistance: For purposes of Article 10.6.1, a *Person* providing *Substantial assistance* must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an *anti-doping organization* or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought.

Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.

Target Testing: Selection of specific *athletes* for *testing* based on criteria set forth in the international Standard for Testing and investigations.

Team Sport: A sport in which the substitution of players is permitted during a *Competition*.

Testing: The parts of the *doping Control* process involving test distribution planning, *Sample* collection, *Sample* handling, and *Sample* transport to the laboratory.

Trafficking: Selling, giving, transporting, sending, delivering or distributing (or *Possessing* for any such purpose) a *Prohibited Substance* or *Prohibited Method* (either physically or by any electronic or other means) by an *athlete, athlete Support Person* or any other *Person* subject to the jurisdiction of an *anti-doping organization* to any third party; provided, however, this definition shall not include the actions of "bona fide" medical personnel involving a *Prohibited Substance* used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving *Prohibited Substances* which are not prohibited in *out-of-Competition testing* unless the circumstances as a whole demonstrate such *Prohibited Substances* are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

TUE: Therapeutic Use Exemption, as described in Article 4.4.

UNESCO Convention: The international Convention against Doping in Sport adopted by the 33rd session of the UNESCO general Conference on 19 October 2005, including any and all amendments adopted by the States Parties to the Convention and the Conference of Parties to the international Convention against Doping in Sport.

Use: The utilization, application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method*.

WADA: The World Anti-Doping Agency.

[Comment to Definitions: Defined terms shall include their plural and possessive forms, as well as those terms used as other parts of speech.]

APPENDIX TWO

EXAMPLES OF THE APPLICATION OF ARTICLE 10

EXAMPLES OF THE APPLICATION OF ARTICLE 10

EXAMPLE 1

Facts: An *adverse analytical finding* results from the presence of an anabolic steroid in an *In-Competition* test (Article 2.1); the *athlete* promptly admits the anti-doping rule violation; the *athlete* establishes *no Significant fault or negligence*; and the *athlete* provides *Substantial assistance*.

Application of *Consequences*:

1. The starting point would be Article 10.2. Because the *athlete* is deemed to have *no Significant fault* that would be sufficient corroborating evidence (Articles 10.2.1.1 and 10.2.3) that the anti-doping rule violation was not intentional, the period of *Ineligibility* would thus be two years, not four years (Article 10.2.2).
2. In a second step, the panel would analyze whether the *fault*-related reductions (Articles 10.4 and 10.5) apply. Based on *no Significant fault or negligence* (Article 10.5.2) since the anabolic steroid is not a *Specified Substance*, the applicable range of sanctions would be reduced to a range of two years to one year (minimum one-half of the two year sanction). The panel would then determine the applicable period of *Ineligibility* within this range based on the *athlete's* degree of *fault*. (Assume for purposes of illustration in this example that the panel would otherwise impose a period of *Ineligibility* of 16 months.)
3. in a third step, the panel would assess the possibility for suspension or reduction under Article 10.6 (reductions not related to *fault*). in this case, only Article 10.6.1 (*Substantial assistance)* applies. (Article 10.6.3, Prompt Admission, is not applicable because the period of *Ineligibility* is already below the two-year minimum set forth in Article 10.6.3.) Based

on *Substantial assistance*, the period of *Ineligibility* could be suspended by three-quarters of 16 months.* The minimum period of *Ineligibility* would thus be four months. (Assume for purposes of illustration in this example that the panel suspends ten months and the period of *Ineligibility* would thus be six months.)

4. Under Article 10.11, the period of *Ineligibility*, in principle, starts on the date of the final hearing decision. However, because the *athlete* promptly admitted the anti-doping rule violation, the period of *Ineligibility* could start as early as the date of *Sample* collection, but in any event the *athlete* would have to serve at least one-half of the *Ineligibility* period (i.e., three months) after the date of the hearing decision (Article 10.11.2).

5. Since the *adverse analytical finding* was committed in a *Competition*, the panel would have to automatically *disqualify* the result obtained in that *Competition* (Article 9).

6. According to Article 10.8, all results obtained by the *athlete* subsequent to the date of the *Sample* collection until the start of the period of *Ineligibility* would also be *disqualified* unless fairness requires otherwise.

7. The information referred to in Article 14.3.2 must be *Publicly disclosed*, unless the *athlete* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).

8. The *athlete* is not allowed to participate in any capacity in a *Competition* or other sport-related activity under the authority of any *Signatory* or its affiliates during the *athlete's* period of *Ineligibility* (Article 10.12.1). However, the *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory* or its affiliates during the shorter of: (a) the last two months of the *athlete's* period of *Ineligibility*, or (b) the last one-quarter of the period of *Ineligibility* imposed (Article 10.12.2). Thus, the *athlete* would be allowed to return to training one and one-half months before the end of the period of *Ineligibility*.

EXAMPLE 2

Facts: An *adverse analytical finding* results from the presence of a stimulant which is a *Specified Substance* in an *In-Competition* test (Article 2.1); the *anti-doping organization* is able to establish that the *athlete* committed the anti-doping rule violation intentionally; the *athlete* is not able to establish that the *Prohibited Substance* was *used out-of-Competition* in a context unrelated to sport performance; the *athlete* does not promptly admit the anti-doping rule violation as alleged; the *athlete* does provide *Substantial assistance*.

Application of *Consequences*:

1. The starting point would be Article 10.2. Because the *anti-doping organization* can establish that the anti-doping rule violation was committed intentionally and the *athlete* is unable to establish that the substance was permitted *out-of-Competition* and the *use* was unrelated to the *athlete's* sport performance (Article 10.2.3), the period of *Ineligibility* would be four years (Article 10.2.1.2).
2. Because the violation was intentional, there is no room for a reduction based on *fault* (no application of Articles 10.4 and 10.5). Based on *Substantial assistance*, the sanction could be suspended by up to three-quarters of the four years.* The minimum period of *Ineligibility* would thus be one year.
3. Under Article 10.11, the period of *Ineligibility* would start on the date of the final hearing decision.
4. Since the *adverse analytical finding* was committed in a *Competition*, the panel would automatically *disqualify* the result obtained in the *Competition*.
5. According to Article 10.8, all results obtained by the *athlete* subsequent to the date of *Sample* collection until the start of the period of *Ineligibility* would also be *disqualified* unless fairness requires otherwise.
6. The information referred to in Article 14.3.2 must be *Publicly disclosed*, unless the *athlete* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).

7. The *athlete* is not allowed to participate in any capacity in a *Competition* or other sport-related activity under the authority of any *Signatory* or its affiliates during the *athlete's* period of *Ineligibility* (Article 10.12.1). However, the *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory* or its affiliates during the shorter of: (a) the last two months of the *athlete's* period of *Ineligibility*, or (b) the last one-quarter of the period of *Ineligibility* imposed (Article 10.12.2). Thus, the *athlete* would be allowed to return to training two months before the end of the period of *Ineligibility*.

EXAMPLE 3

Facts: An *adverse analytical finding* results from the presence of an anabolic steroid in *an out-of-Competition* test (Article 2.1); the *athlete* establishes *no Significant fault or negligence*; the *athlete* also establishes that the *adverse analytical finding* was caused by a *Contaminated Product*.

Application of *Consequences*:

1. The starting point would be Article 10.2. Because the *athlete* can establish through corroborating evidence that he did not commit the anti-doping rule violation intentionally, i.e., he had *no Significant fault* in *using* a *Contaminated Product* (Articles 10.2.1.1 and 10.2.3), the period of *Ineligibility* would be two years (Article 10.2.2).
2. In a second step, the panel would analyze the *fault*-related possibilities for reductions (Articles 10.4 and 10.5). Since the *athlete* can establish that the anti-doping rule violation was caused by a *Contaminated Product* and that he acted with *no Significant fault or negligence* based on Article 10.5.1.2, the applicable range for the period of *Ineligibility* would be reduced to a range of two years to a reprimand. The panel would determine the period of *Ineligibility* within this range, based on the *athlete's* degree of *fault*. (Assume for purposes of illustration in this example that the panel would otherwise impose a period of *Ineligibility* of four months.)

3. According to Article 10.8, all results obtained by the *athlete* subsequent to the date of *Sample* collection until the start of the period of *Ineligibility* would be *disqualified* unless fairness requires otherwise.
4. The information referred to in Article 14.3.2 must be *Publicly disclosed*, unless the *athlete* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).
5. The *athlete* is not allowed to participate in any capacity in a *Competition* or other sport-related activity under the authority of any *Signatory* or its affiliates during the *athlete's* period of *Ineligibility* (Article 10.12.1). However, the *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory* or its affiliates during the shorter of: (a) the last two months of the *athlete's* period of *Ineligibility*, or (b) the last one-quarter of the period of *Ineligibility* imposed (Article 10.12.2). Thus, the *athlete* would be allowed to return to training one month before the end of the period of *Ineligibility*.

EXAMPLE 4

Facts: An *athlete* who has never had an *adverse analytical finding* or been confronted with an anti-doping rule violation spontaneously admits that she *used* an anabolic steroid to enhance her performance. The *athlete* also provides *Substantial assistance*.

Application of *Consequences*:

1. Since the violation was intentional, Article 10.2.1 would be applicable and the basic period of *Ineligibility* imposed would be four years.
2. There is no room for *fault*-related reductions of the period of *Ineligibility* (no application of Articles 10.4 and 10.5).
3. Based on the *athlete's* spontaneous admission (Article 10.6.2) alone, the period of *Ineligibility* could be reduced by up to one-half of the four years. Based on the *athlete's Substantial*

assistance (Article 10.6.1) alone, the period of *Ineligibility* could be suspended up to three-quarters of the four years.* Under Article 10.6.4, in considering the spontaneous admission and *Substantial assistance* together, the most the sanction could be reduced or suspended would be up to three-quarters of the four years. The minimum period of *Ineligibility* would be one year.

4. The period of *Ineligibility*, in principle, starts on the day of the final hearing decision (Article 10.11). if the spontaneous admission is factored into the reduction of the period of *Ineligibility*, an early start of the period of *Ineligibility* under Article 10.11.2 would not be permitted. The provision seeks to prevent an *athlete* from benefitting twice from the same set of circumstances. However, if the period of *Ineligibility* was suspended solely on the basis of *Substantial assistance*, Article 10.11.2 may still be applied, and the period of *Ineligibility* started as early as the *athlete's* last *use* of the anabolic steroid.

5. According to Article 10.8, all results obtained by the *athlete* subsequent to the date of the anti-doping rule violation until the start of the period of *Ineligibility* would be *disqualified* unless fairness requires otherwise.

6. The information referred to in Article 14.3.2 must be *Publicly disclosed*, unless the *athlete* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).

7. The *athlete* is not allowed to participate in any capacity in a *Competition* or other sport-related activity under the authority of any *Signatory* or its affiliates during the *athlete's* period of *Ineligibility* (Article 10.12.1). However, the *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory* or its affiliates during the shorter of: (a) the last two months of the *athlete's* period of *Ineligibility*, or (b) the last one-quarter of the period of *Ineligibility* imposed (Article 10.12.2). Thus, the *athlete* would be allowed to return to training two months before the end of the period of *Ineligibility*.

EXAMPLE 5

Facts: An *athlete Support Person* helps to circumvent a period of *Ineligibility* imposed on an *athlete* by entering him into a *Competition* under a false name. The *athlete Support Person* comes forward with this anti-doping rule violation (Article 2.9) spontaneously before being notified of an anti-doping rule violation by an *anti-doping organization.*

Application of *Consequences:*

1. According to Article 10.3.4, the period of *Ineligibility* would be from two up to four years, depending on the seriousness of the violation. (Assume for purposes of illustration in this example that the panel would otherwise impose a period of *Ineligibility* of three years.)
2. There is no room for *fault*-related reductions since intent is an element of the anti-doping rule violation in Article 2.9 (see comment to Article 10.5.2).
3. According to Article 10.6.2, provided that the admission is the only reliable evidence, the period of *Ineligibility* may be reduced down to one-half. (Assume for purposes of illustration in this example that the panel would impose a period of *Ineligibility* of 18 months.)
4. The information referred to in Article 14.3.2 must be *Publicly disclosed* unless the *athlete Support Person* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).

EXAMPLE 6

Facts: An *athlete* was sanctioned for a first anti-doping rule violation with a period of *Ineligibility* of 14 months, of which four months were suspended because of *Substantial assistance*. Now, the *athlete* commits a second anti-doping rule violation resulting from the presence of a stimulant which is not a *Specified Substance* in an *In-Competition* test (Article 2.1); the *athlete* establishes *no Significant fault or negligence*; and the *athlete* provided *Substantial assistance*. if this were a first violation, the panel would sanction the *athlete* with a period of *Ineligibility* of 16 months and suspend six months for *Substantial assistance*.

Application of *Consequences*:

1. Article 10.7 is applicable to the second anti-doping rule violation because Article 10.7.4.1 and Article 10.7.5 apply.

2. Under Article 10.7.1, the period of *Ineligibility* would be the greater of:

   (a) six months;

   (b) one-half of the period of *Ineligibility* imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6 (in this example, that would equal one-half of 14 months, which is seven months); or

   (c) twice the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6 (in this example, that would equal two times 16 months, which is 32 months).

   Thus, the period of *Ineligibility* for the second violation would be the greater of (a), (b) and (c), which is a period of *Ineligibility* of 32 months.

3. in a next step, the panel would assess the possibility for suspension or reduction under Article 10.6 (non-*fault*-related reductions). in the case of the second violation, only Article 10.6.1 (*Substantial assistance*) applies. Based on *Substantial assistance*, the period of *Ineligibility* could be suspended by three-quarters of 32 months.* The minimum period of *Ineligibility* would thus be eight months. (Assume for purposes of illustration in this example that the panel suspends eight months of the period of *Ineligibility* for *Substantial assistance*, thus reducing the period of *Ineligibility* imposed to two years.)

4. Since the *adverse analytical finding* was committed in a *Competition*, the panel would automatically *disqualify* the result obtained in the *Competition.*

5. According to Article 10.8, all results obtained by the *athlete* subsequent to the date of *Sample* collection until the start of the period of *Ineligibility* would also be *disqualified* unless fairness requires otherwise.

6. The information referred to in Article 14.3.2 must be *Publicly disclosed*, unless the *athlete* is a *Minor*, since this is a mandatory part of each sanction (Article 10.13).

7. The *athlete* is not allowed to participate in any capacity in a *Competition* or other sport-related activity under the authority of any *Signatory* or its affiliates during the *athlete's* period of *Ineligibility* (Article 10.12.1). However, the *athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory* or its affiliates during the shorter of: (a) the last two months of the *athlete's* period of *Ineligibility*, or (b) the last one-quarter of the period of *Ineligibility* imposed (Article 10.12.2). Thus, the *athlete* would be allowed to return to training two months before the end of the period of *Ineligibility.*

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* Upon the approval of *Wada* in exceptional circumstances, the maximum suspension of the period of *Ineligibility* for *Substantial assistance* may be greater than three-quarters, and reporting and publication may be delayed.

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2021 CODE REVISION – FIRST DRAFT
(FOLLOWING THE FIRST CONSULTATION PHASE)

SUMMARY OF MAJOR PROPOSED CHANGES FOUND IN THE FIRST DRAFT OF THE 2021 CODE.

Changes are listed in the order in which they appear in the Code, not in order of importance.

1. Emphasis on Health as a Rationale for the Code

   A recent decision of the European Court of Human Rights relied on public health as a primary basis for upholding the whereabouts requirements of the Code. As suggested by a number of stakeholders, health has been moved to the top of the list of rationales for the Code and is specifically mentioned in the sentence following that list.

2. Delegation of Doping Control Functions by Anti-Doping Organizations

   There is some confusion under the current Code whether an anti-doping organization may delegate aspects of the doping control process and the extent to which it remains responsible following such delegation. The Introduction to Part One of the Code and Article 20 which sets forth stakeholder's responsibilities, make clear that anti-doping organizations are responsible for all aspects of doping control, that they may delegate any of those aspects, but they remain fully responsible for the performance of those aspects in compliance with the Code.

3. Expansion of Laboratory Reports for Atypical Findings Beyond Endogenous Substances – (Articles 2.1.4 and 7.4)

   When a laboratory reports a sample as an atypical finding, that sends a message to the anti-doping organization that the sample may or may not contain a prohibited substance. It is then the anti-doping organization's responsibility to conduct an investigation to determine whether the sample should be treated as an adverse analytical finding or not. Under the current Code, a laboratory may only report test results involving endogenous substances as atypical findings. The proposed draft permits WADA to develop a list of other prohibited substances which may be reported as atypical findings and thereby trigger investigations. This approach would be particularly helpful when trace levels of clenbuterol are detected in a sample. It is well known that meat contamination in Mexico and China can cause trace levels of clenbuterol to appear in an athlete's urine. Presently, there is significant disparity in how different anti-doping organizations treat

these potential meat contamination cases. This change would allow a trace amount of clenbuterol to be reported as an atypical finding which would be investigated and resolved in a harmonized way under WADA's new International Standard for Results Management and Hearings.

4. Fraudulent Conduct During Results Management and Hearing Process (New Comment to Article 2.5, and New Articles 10.3.1.1 and 10.7)

A number of anti-doping organizations have experienced problems with athletes engaging in fraudulent conduct during the results management and hearing process, including for example, submitting fraudulent documents or procuring false witness testimony. Under the current Code, there is no downside in terms of sanctions to an athlete who chooses to engage in this type of behavior. New Articles 10.3.1.1 and 10.7 provide that an additional sanction of 0-2 years ineligibility may be imposed for this misconduct.

5. Increasing the Upper End of the Sanction for Complicity (Article 2.9)

The current sanction for an anti-doping rule violation involving complicity is 2-4 years ineligibility. However, in some circumstances, violations involving complicity can be very similar to violations involving "administration" (Article 2.8) where the current sanction is 4 years to life ineligibility. To retain some greater flexibility in the sanctioning of certain types of complicity, but to avoid any argument that the most serious types of complicity, which could also be viewed as administration, are subject to a sanction cap of 4 years, the range of ineligibility for complicity has been changed to 2 years – lifetime ineligibility.

6. Modification of Article 2.10 - Prohibited Association

This Article prohibits association in a sport related capacity with an athlete support person who is serving a period of ineligibility. Since this Article was incorporated into the 2015 Code, there have been very few, if any, anti-doping rule violation cases brought under this Article. A number of anti-doping organizations have expressed concern that one reason for this is because the current requirement that an athlete must be notified before an anti-doping rule violation for prohibited association can be asserted, simply drives that prohibited association underground. In response to that concern, this Article has been changed to eliminate the advance notice requirement and instead, places the burden on the anti-doping organization to demonstrate that the athlete knew, or was reckless in not knowing, that the athlete support person was ineligible.

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7. Addition of a New Article Providing Protection for Individuals Reporting Violations (Article 2.11)

This Article makes it an anti-doping rule violation to threaten another person to discourage that person from the good faith reporting of an anti-doping rule violation, non-compliant with the Code or other doping activity or to retaliate against another person for doing so. The range of sanction for these violations is two years to lifetime ineligibility depending on the seriousness of the violation.

8. Further Analysis of Samples (Old Article 6.5)

The Article addressing further analysis of samples has been broken into three parts:

a) Prior to the time an athlete has been notified of an anti-doping rule violation, there is no limitation on repeated analysis of the sample. After the athlete has been notified of an adverse analytical finding, additional analysis may take place only with the consent of the athlete or the hearing body in the case. The rationale for this is that once an athlete has been notified of an adverse analytical finding, he or she should not be forced to react to a moving target in terms of the sample analysis during the course of the hearing process. If further analysis is appropriate, then that may be directed by the hearing body (Article 6.5).

b) When a sample has been declared negative, there is no limitation imposed on either the anti-doping organization that initiated and directed sample collection or WADA conducting further analysis (retesting) on the sample. Other anti-doping organizations wishing to conduct further analysis on a sample must get permission to do so from either the anti-doping organization that initiated and directed the collection of the sample or WADA (Article 6.6).

c) WADA's right to take physical possession of stored samples, with or without notice, is expressly stated (Article 6.7).

9. WADA's Right to Require an Anti-Doping Organization to Conduct Results Management – (Article 7.1.1)

It has occasionally been the case that the anti-doping organization with results management authority has refused to conduct results management. That is not only a Code compliance issue, it is necessary that some anti-doping organization conduct results management in the individual case to determine whether or not an anti-doping rule violation was committed. An addition to Article 7.1.1 makes clear that in this unique circumstance, WADA may demand that the anti-

doping organization with results management authority conduct results management and, if the organization refuses, WADA may designate another anti-doping organization to conduct the results management with the resulting cost borne by the refusing anti-doping organization.

10. General Changes to Results Management (Article 7)

A number of stakeholders suggested detailed improvements to the results management process described in Article 7. WADA's plan is to move much of the detail currently found in Article 7 into the new International Standard for Results Management and Hearings. Stakeholder suggestions related to this Article will be considered in the drafting of that new International Standard.

11. More Rigorous Standards for Fair Hearings under Article 8

A number of stakeholders have suggested that the fair hearing requirement in Article 8 be expanded. A significant concern expressed by many is that the "impartial hearing panel" requirement in Article 8.1 is not being followed by all Signatories where, for example in some cases, the same individual is involved in the investigation, the decision to charge an anti-doping rule violation and the hearing on whether a violation has been committed. Rather than add pages to the Code which set forth detailed rules to ensure a fair hearing, these requirements will be incorporated into a new International Standard for Results Management and Hearings.

12. Added Flexibility for Sanctioning Minors

The current Code provides increased flexibility for sanctioning minors as follows: a minor need not establish how the prohibited substance entered his or her system in order to benefit from a reduced sanction on account of No Significant Fault or Negligence (Definition of No Significant Fault or Negligence). Public Reporting in a case involving a minor is not mandatory and, if reported, must be proportionate to the facts and circumstances of the case (Article 14.3.6). The First Draft of the 2021 Code adds additional flexibility in the sanctioning of minors in the following three respects: for purposes of the 4 year ban for the presence, use, or possession of a non-specified substance, the burden is no longer on the minor to establish that the anti-doping rule violation was not intentional (Article 10.2.1); when a minor can establish No Significant Fault or Negligence for an anti-doping rule violation involving a non-specified substance, the minimum period of ineligibility imposed is now a reprimand instead of the 1 year minimum applicable to other athletes (Article 10.5.1.3). Finally, based on feedback from athletes who are concerned about giving sanctioning flexibility to 16 and 17 year old athletes who compete at the elite level, the definition of "minor" has been modified to exclude 16 and 17 year old athletes who are in a registered testing pool, or who have competed in an international event in the open category.

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13. New Category of Athletes – "Recreational Athletes" Permitted More Flexibility in the Imposition of Consequences

Under the current Code, anti-doping organizations are not required to test lower-level athletes, but if they do and anti-doping rule violations result, then all of the consequences imposed by the Code apply. A number of the stakeholders who regularly test these lower-level athletes have pointed out that: they do so as a matter of public health and imposing full Code consequences (as opposed to rehabilitation) is counter-productive to that objective; that these lower-level athletes have not had the same anti-doping educational opportunities as higher-level athletes and that the consequence of mandatory public disclosure on the employment status of someone who participates in sport only at the recreational level is unduly harsh. A new Code definition describes these lower-level athletes as "Recreational Athletes." This definition includes athletes who: are not and have not for the prior 5 years been an international-level or national-level athlete; have never represented a country in an international event; have never been in a registered testing pool or other whereabouts pool of an international federation or national anti-doping organization; or at the time of the anti-doping rule violation were not nationally ranked in the top 50. In the First Draft, "Recreational Athletes" benefit from the same flexibility in sanctioning as minors as provided in Article 14.3.6 (public disclosure not mandatory) and Article 10.5.1.3 (minimum sanction is a reprimand when no significant fault is established).

14. Addressing the Problem of Common Contaminants in Supplements and Other Products

The ability of WADA accredited laboratories to detect miniscule quantities of prohibited substances in athlete samples has, in some cases, improved one hundred to one thousand fold over the last decade. This increased analytical sensitivity has made it easier to detect the tail end of the excretion curve from the intentional use of a prohibited substance. However, it has also increased the likelihood that an adverse analytical finding will result from contamination of a supplement or other product. The current Code provides that in order for an athlete to receive a reduced sanction on account of product contamination, the athlete must be able to identify the contaminated product which he or she consumed that caused the adverse analytical finding (Article 10.5.1.2 in combination with the definition of No Significant Fault or Negligence). Generally, this is a good rule to protect the rights of clean athletes. However, there are cases where the adverse analytical finding involves a very low level of a prohibited substance which is known to occur in contaminated products, but the athlete is not able to specifically identify the product which caused the adverse analytical finding. In some of these cases, the adverse analytical finding is much more likely the result of product contamination than the tail end of an excretion curve, but under the current rule no reduction of sanction is permitted. Rather than modify the rule in the current Code related to contaminated products, the Drafting Team's recommendation is that a better approach would be to raise the reporting limits for those

prohibited substances which are known contaminants. The WADA List Committee is working on an approach to do this.

15. The Problem of Substances Which are Not Prohibited Out-of-Competition Appearing, in Trace Amounts, in In-Competition Samples

It has always been the case under the Code that some substances are prohibited at all times, and other substances are only prohibited in-competition. The general rule has been that if a substance appears in an athlete's sample in an in-competition test it is an adverse analytical finding, it doesn't matter when the substance was taken. The consequences of this approach have become increasingly problematic as WADA accredited laboratories have developed the ability to detect evermore minute quantities of prohibited substances in an athlete's urine in in-competition samples. In some cases these substances were obviously used out-of-competition and could not possibly have had an in-competition effect. To address this problem, the WADA List Committee is considering reporting thresholds for certain substances which are prohibited in-competition only but which may appear in trace amounts in in-competition tests.

16. Expansion of the Types of Cooperation which Justify a Reduced Sanction for Substantial Assistance – (Article 10.6.1.1)

Under the current Code, an athlete or other person who provides substantial assistance to an anti-doping organization, criminal authority, or a professional disciplinary body, in relation to anti-doping rule violations may receive a suspension of part of the otherwise applicable sanction. In the First Draft of the 2021 Code, substantial assistance credit may also be given for assistance provided in relation to establishing non-compliance with the Code and International Standards and other types of sport integrity violations.

17. New Article Entitled "Prompt Admission of an Anti-Doping Rule Violation After Being Confronted with a Violation and Acceptance of Consequences" – Article 10.6.3

The current Code contains two similar Articles: "Prompt Admission" (Article 10.6.3) and "Timely Admission" (Article 10.11.2). The "Prompt Admission" Article allowed an athlete facing a 4 year ban to receive a reduced sanction down to a minimum 2 years for prompt admission of the violation subject to the approval of the anti-doping organization bringing the case and WADA. "Timely Admission" of an anti-doping rule violation allowed the period of ineligibility to start as early as the date of sample collection instead of the date of the hearing decision which is normally the case under the Code. The underlying rationale for both of these Articles was that the admission would save the anti-doping organization the time and expense of a hearing. In practice, however, what frequently has happened is that the athlete will admit the anti-doping rule

violation but insist on going to hearing on the issue of consequences. As a result there is no significant savings of time or money. In the new Article, proposed in this First Draft, the athlete can only receive a reduction in the 4 year ban or a sanction start date going back to sample collection if the athlete and anti-doping organization agree on the applicable consequence and that agreement is approved by WADA.

18. Re-Introduction of the Concept of "Aggravating Circumstances" (Article 10.7)

The 2009 Code provided for the increase of the otherwise applicable period of ineligibility when aggravating circumstances were present. When the 2015 Code increased the period of ineligibility for intentional doping from 2 years to 4 years, the Aggravating Circumstances Article was deleted. The Aggravating Circumstances Article has been reinserted in the First Draft to deal with special or exceptional circumstances where an additional period of ineligibility from 0-2 years is appropriate. For example, when fraudulent conduct occurs during the results management or hearing process (Articles 10.3.1.1 and 10.7.2) or where a provisional suspension is violated (Definition of Aggravating Circumstances).

19. Improvements to the Multiple Violation Rules - (Article 10.8)

Two proposed changes to the Multiple Violations Rules are noteworthy. First, the rule in the current Code is that an athlete cannot be charged with a second anti-doping rule violation until he or she has been previously notified of a first violation. This makes sense in the circumstance where an athlete tests positive twice in the same one week doping cycle - he or she should not be subject to the increased sanctions for a first and second violation. When an anti-doping organization discovers an earlier anti-doping rule violation which occurred before notice of a first violation, the approach has been to go back and consider the two violations together as a first violation for purposes of imposing the longer of the two sanctions. For example, under the current Code, if an athlete commits two anti-doping rule violations 4 years apart, but the first occurring violation is not discovered until after notice has been given of the second occurring violation, then the combined period of ineligibility would still only be 4 years. This is a particular problem when further analysis of old samples produces an adverse analytical finding. The proposed First Draft of the 2021 Code addresses this problem in two ways. If the anti-doping organization can establish that the two violations resulted from separate culpable intents, which is presumed if the two violations are more than 12 months apart, then they can be sanctioned with the longer periods of ineligibility applicable to separate first and second violations (Article 10.8.4.3). Alternatively, the sanction can be increased by an additional 0-2 years on the basis of aggravating circumstances (Article 10.7).

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Second, if a person commits a second anti-doping rule violation during a period of ineligibility, the period of ineligibility for the second violation is served consecutively after the period of this first violation (Article 10.8.4.4).

20. Forfeited Prize Money Goes to Other Athletes (Article 10.10)

As modified, Article 10.10 now provides that when an athlete is required to forfeit prize money as a result of an anti-doping rule violation and the forfeited prize money is collected by the anti-doping organization, then the forfeited prize money shall be distributed to the athletes who would have been entitled to the prize money had the forfeiting athlete not competed. It is left up to the rules of the sporting body whether any rankings which are based on prize money will be reconsidered. Athlete stakeholders have argued that forfeited prize money which has been recovered, belongs to the athletes who were cheated, and to the extent an anti-doping organization wants to recoup some of its costs in bringing the case, it is permitted to do so in Article 10.11.

21. Clarifications Relating to Sanctions for Violation of a Provisional Suspension

The general rule is that if a person respects the terms of a provisional suspension, that provisional suspension will be credited against any period of ineligibility which may ultimately be imposed (2015 Code - Article 10.11.3). The intent of this provision was that if the person did not fully respect the provisional suspension, then he or she would get no credit against the ultimate sanction. That intent has been clarified in new Article 10.12.2.1. Any results obtained during the period of violation are also disqualified (Article 10.7). In addition, the new Aggravating Circumstances Article (Article 10.7) provides that a person's violation of the terms of a provisional suspension may independently result in a sanction from 0-2 years. Finally, Article 14.3.1 (Public Disclosure) has been modified to make clear that prior to the final decision in the case, an anti-doping organization may publicly disclose the identity of the individual who has been charged and whether a provisional suspension has been imposed.

22. Express Authority of a Signatory to Exclude Athletes and Other Persons from its Events as a Sanction Against a Member Federation (Article 12.2)

The language added to Article 12.2 makes clear that discipline by the IOC against a member National Olympic Committee or by an international federation against a member national federation may include exclusion of athletes from that country from its events.
This is already the current practice under the Code.

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23. Implementation of Decisions (Formerly Mutual Recognition) – (Article 15)

Two concerns with the current Code are addressed in the revisions to this Article. First, there has been some contention that when a Signatory recognizes the decision of another Signatory, that recognition decision is itself subject to appeal by the athlete (as opposed to an appeal of the underlying decision). That was never the intent of the Code. As revised, Article 15 provides that a final decision by a Signatory is automatically implemented by other Signatories following notice of that decision to WADA. The first Signatory's decision may, of course, be appealed to CAS by WADA and other Signatories, but it shall remain in effect until reversed by CAS.

The second issue with Article 15 is the fact that mutual recognition of Provisional Suspension decisions is neither required nor discussed. As revised, the Article provides that mandatory Provisional Suspensions imposed as the result of a Provisional Suspension hearing or voluntary acceptance are automatically implemented. (Provisional Suspensions are "mandatory" when there is an adverse analytical finding for a non-specified substance). Optional Provisional Suspensions (suspensions for adverse analytical findings for specified substances and other anti-doping rule violations) may be implemented by other Signatories in their discretion.

Any anti-doping organization that imposes or recognizes a Provisional Suspension assumes a risk that the anti-doping rule violation upon which the Provisional Suspension is based will not ultimately be upheld. The likelihood that an adverse analytical finding will ultimately be reversed is sufficiently low, and violations involving non-specified substances are sufficiently serious, that the automatic implementation of mandatory Provisional Suspensions is justified. On the other hand, since the Signatory imposing an
optional Provisional Suspension had the discretion to impose a Provisional Suspension in the first place, other Signatories should also have discretion in whether they choose to implement it.

24. Signatories' Expectation of Governments – Access for Doping Control Officials and Removal of Samples - (Article 22)

The ability to conduct effective no advance notice testing is frustrated in a number of countries by government regulations that limit the ability of doping control officials to enter the country or to have access to restricted areas where athletes train and live. There are also problems in some countries removing blood and urine samples for analysis outside of the country. These issues are addressed in the proposed Amendment to Article 22.2. It is the unanimous view of Signatories and athletes that these problems must be remedied through the implementation of corrective government regulation.

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25. How Does a Sport Organization Become a *Signatory*?

The only change which has been made to the Code in relation to WADA's acceptance of a sport organization as a Signatory is the addition of the following drafting note to Article 23.2:

"*WADA will publish a Guideline describing the process for an organization to become a Signatory.*"

The criteria for when and how WADA will accept an organization as a Signatory does not need to be spelled out in the Code; a Guideline is sufficient. With that said, it is the strong view of the Project Team that WADA's willingness to accept an organization as a Signatory should be kept completely separate from International Federation politics. WADA is an anti-doping organization whose business is to protect clean athletes in all sports. WADA's goal should be to have as many sport organizations Code compliant as possible - whether or not they are part of the Olympic Movement and whether or not an International Federation which is already a Signatory wants to put a competitor at a disadvantage by freezing it out of Code Signatory status. If the Olympic Movement is concerned about funding WADA's compliance monitoring of organizations outside the Olympic Movement, that can be addressed in the fees which WADA charges non-Olympic Movement organizations as part of their Signatory status.

26. Subject Areas Where Changes May be Made in Future Code Drafts Following Finalization of Recommendations from Working Groups

There are four areas where no attempt at Code revision was made pending receipt of recommendations from active working groups: Data Privacy (Article 14.6); Education (Article 18); WADA Governance and Mechanisms for Monitoring WADA's Performance; and appropriate references to The Anti-Doping Charter of Athletes' Rights. Stakeholder comments on these subjects have been referred to an applicable working group for their consideration. The expectation is that these areas will be addressed as may be appropriate in the Second Draft of the 2021 Code.

THE WORLD ANTI-DOPING CODE

INTERNATIONAL STANDARD

PROHIBITED LIST

JANUARY 2018

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The official text of the *Prohibited List* shall be maintained by *WADA* and shall be published in English and French. In the event of any conflict between the English and French versions, the English version shall prevail.

This List shall come into effect on 1 January 2018

SUBSTANCES & METHODS
PROHIBITED AT ALL TIMES
(IN- AND OUT-OF-COMPETITION)

IN ACCORDANCE WITH ARTICLE 4.2.2 OF THE WORLD ANTI-DOPING CODE, ALL *PROHIBITED SUBSTANCES* SHALL BE CONSIDERED AS *"SPECIFIED SUBSTANCES"* EXCEPT SUBSTANCES IN CLASSES S1, S2, S4.4, S4.5, S6.A, AND *PROHIBITED METHODS* M1, M2 AND M3.

PROHIBITED SUBSTANCES

S0 NON-APPROVED SUBSTANCES

Any pharmacological substance which is not addressed by any of the subsequent sections of the *List* and with no current approval by any governmental regulatory health authority for human therapeutic use (e.g. drugs under pre-clinical or clinical development or discontinued, designer drugs, substances approved only for veterinary use) is prohibited at all times.

S1 ANABOLIC AGENTS

Anabolic agents are prohibited.

1. ANABOLIC ANDROGENIC STEROIDS (AAS)

a. Exogenous* AAS, including:

1-Androstenediol (5α-androst-1-ene-3β,17β-diol);
1-Androstenedione (5α-androst-1-ene-3,17-dione);
1-Androsterone (3α-hydroxy-5α-androst-1-ene-17-one);
1-Testosterone (17β-hydroxy-5α-androst-1-en-3-one);
4-Hydroxytestosterone (4,17β-dihydroxyandrost-4-en-3-one);
Bolandiol (estr-4-ene-3β,17β-diol);
Bolasterone;
Calusterone;
Clostebol;
Danazol ([1,2]oxazolo[4',5':2,3]pregna-4-en-20-yn-17α-ol);
Dehydrochlormethyltestosterone (4-chloro-17β-hydroxy-17α-methylandrosta-1,4-dien-3-one);
Desoxymethyltestosterone (17α-methyl-5α-androst-2-en-17β-ol);
Drostanolone;
Ethylestrenol (19-norpregna-4-en-17α-ol);
Fluoxymesterone;
Formebolone;
Furazabol (17α-methyl [1,2,5]oxadiazolo[3',4':2,3]-5α-androstan-17β-ol);
Gestrinone;
Mestanolone;
Mesterolone;
Metandienone (17β-hydroxy-17α-methylandrosta-1,4-dien-3-one);
Metenolone;
Methandriol;
Methasterone (17β-hydroxy-2α,17α-dimethyl-5α-androstan-3-one);
Methyldienolone (17β-hydroxy-17α-methylestra-4,9-dien-3-one);
Methyl-1-testosterone (17β-hydroxy-17α-methyl-5α-androst-1-en-3-one);
Methylnortestosterone (17β-hydroxy-17α-methylestr-4-en-3-one);
Methyltestosterone;
Metribolone (methyltrienolone, 17β-hydroxy-17α-methylestra-4,9,11-trien-3-one);
Mibolerone;
Norboletone;
Norclostebol;
Norethandrolone;
Oxabolone;
Oxandrolone;
Oxymesterone;
Oxymetholone;
Prostanozol (17β-[(tetrahydropyran-2-yl)oxy]-1'H-pyrazolo[3,4:2,3]-5α-androstane);
Quinbolone;
Stanozolol;
Stenbolone;
Tetrahydrogestrinone (17-hydroxy-18a-homo-19-nor-17α-pregna-4,9,11-trien-3-one);
Trenbolone (17β-hydroxyestr-4,9,11-trien-3-one);

and other substances with a similar chemical structure or similar biological effect(s).

b. Endogenous AAS when administered exogenously:**

19-Norandrostenediol (estr-4-ene-3,17-diol);
19-Norandrostenedione (estr-4-ene-3,17-dione);
Androstanolone (5α-dihydrotestosterone, 17β-hydroxy-5α-androstan-3-one);
Androstenediol (androst-5-ene-3β,17β-diol);
Androstenedione (androst-4-ene-3,17-dione);
Boldenone;
Boldione (androsta-1,4-diene-3,17-dione);
Nandrolone (19-nortestosterone);
Prasterone (dehydroepiandrosterone, DHEA, 3β-hydroxyandrost-5-en-17-one);
Testosterone;

and their metabolites and isomers, including but not limited to:

3β-Hydroxy-5α-androstan-17-one;
5α-Androst-2-ene-17-one;
5α-Androstane-3α,17α-diol;
5α-Androstane-3α,17β-diol;
5α-Androstane-3β,17α-diol;
5α-Androstane-3β,17β-diol;
5β-Androstane-3α,17β-diol;
7α-Hydroxy-DHEA;
7β-Hydroxy-DHEA;
4-Androstenediol (androst-4-ene-3β, 17β-diol);
5-Androstenedione (androst-5-ene-3,17-dione);
7-Keto-DHEA;
19-Norandrosterone;
19-Noretiocholanolone;
Androst-4-ene-3α,17α-diol;
Androst-4-ene-3α,17β-diol;
Androst-4-ene-3β,17α-diol;
Androst-5-ene-3α,17α-diol;
Androst-5-ene-3α,17β-diol;
Androst-5-ene-3β,17α-diol;
Androsterone;
Epi-dihydrotestosterone;
Epitestosterone;
Etiocholanolone.

2. OTHER ANABOLIC AGENTS

Including, but not limited to:
Clenbuterol, selective androgen receptor modulators (SARMs, e.g. andarine, LGD-4033, ostarine and RAD140), tibolone, zeranol and zilpaterol.

For purposes of this section:
* "exogenous" refers to a substance which is not ordinarily produced by the body naturally.
** "endogenous" refers to a substance which is ordinarily produced by the body naturally.

S2 PEPTIDE HORMONES, GROWTH FACTORS, RELATED SUBSTANCES, AND MIMETICS

The following substances, and other substances with similar chemical structure or similar biological effect(s), are prohibited:

1. Erythropoietins (EPO) and agents affecting erythropoiesis, including, but not limited to:

1.1 Erythropoietin-Receptor Agonists, e.g.
Darbepoetins (dEPO);
Erythropoietins (EPO);
EPO based constructs [EPO-Fc, methoxy polyethylene glycol-epoetin beta (CERA)];
EPO-mimetic agents and their constructs (e.g. CNTO-530, peginesatide).

1.2 Hypoxia-inducible factor (HIF) activating agents, e.g.
Argon;
Cobalt;
Molidustat;
Roxadustat (FG-4592);
Xenon.

1.3 GATA inhibitors, e.g.
K-11706.

1.4 TGF-beta (TGF-β) inhibitors, e.g.
Luspatercept;
Sotatercept.

1.5 Innate repair receptor agonists, e.g.
Asialo EPO;
Carbamylated EPO (CEPO).

2. Peptide Hormones and Hormone Modulators,
2.1 Chorionic Gonadotrophin (CG) and Luteinizing Hormone (LH) and their releasing factors, e.g. Buserelin, deslorelin, gonadorelin, goserelin, leuprorelin, nafarelin and triptorelin, in males;

2.2 Corticotrophins and their releasing factors, e.g. Corticorelin;

2.3 Growth Hormone (GH), its fragments and releasing factors, including, but not limited to:
Growth Hormone fragments, e.g.
AOD-9604 and hGH 176-191;
Growth Hormone Releasing Hormone (GHRH) and its analogues, e.g.
CJC-1293, CJC-1295, sermorelin and tesamorelin;
Growth Hormone Secretagogues (GHS), e.g.
ghrelin and ghrelin mimetics, e.g.
anamorelin, ipamorelin and tabimorelin;
GH-Releasing Peptides (GHRPs), e.g.
alexamorelin, GHRP-1, GHRP-2 (pralmorelin), GHRP-3, GHRP-4, GHRP-5, GHRP-6, and hexarelin.

3. Growth Factors and Growth Factor Modulators, including, but not limited to:
Fibroblast Growth Factors (FGFs);
Hepatocyte Growth Factor (HGF);
Insulin-like Growth Factor-1 (IGF-1) and its analogues;
Mechano Growth Factors (MGFs);
Platelet-Derived Growth Factor (PDGF);
Thymosin-β4 and its derivatives e.g. TB-500;
Vascular-Endothelial Growth Factor (VEGF).

Additional growth factors or growth factor modulators affecting muscle, tendon or ligament protein synthesis/degradation, vascularisation, energy utilization, regenerative capacity or fibre type switching.

S3 BETA-2 AGONISTS

All selective and non-selective beta-2 agonists, including all optical isomers, are prohibited.
Including, but not limited to:
Fenoterol;
Formoterol;
Higenamine;
Indacaterol;
Olodaterol;
Procaterol;
Reproterol;
Salbutamol;
Salmeterol;
Terbutaline;
Tulobuterol;
Vilanterol.

Except:
- Inhaled salbutamol: maximum 1600 micrograms over 24 hours in divided doses not to exceed 800 micrograms over 12 hours starting from any dose;
- Inhaled formoterol: maximum delivered dose of 54 micrograms over 24 hours;
- Inhaled salmeterol: maximum 200 micrograms over 24 hours.

The presence in urine of salbutamol in excess of 1000 ng/mL or formoterol in excess of 40 ng/mL is not consistent with therapeutic use of the substance and will be considered as an *Adverse Analytical Finding* (*AAF*) unless the *Athlete* proves, through a controlled pharmacokinetic study, that the abnormal result was the consequence of a therapeutic dose (by inhalation) up to the maximum dose indicated above.

S4 HORMONE AND METABOLIC MODULATORS

The following hormone and metabolic modulators are prohibited:

1. Aromatase inhibitors including, but not limited to:
4-Androstene-3,6,17 trione (6-oxo);
Aminoglutethimide;
Anastrozole;
Androsta-1,4,6-triene-3,17-dione (androstatrienedione);

Androsta-3,5-diene-7,17-dione (arimistane);
Exemestane;
Formestane;
Letrozole;
Testolactone.

2. Selective estrogen receptor modulators (SERMs) including, but not limited to:
Raloxifene;
Tamoxifen;
Toremifene.

3. Other anti-estrogenic substances including, but not limited to:
Clomifene;
Cyclofenil;
Fulvestrant.

4. Agents modifying myostatin function(s) including, but not limited, to: myostatin inhibitors.

5. Metabolic modulators:
5.1 Activators of the AMP-activated protein kinase (AMPK), e.g. AICAR, SR9009; and Peroxisome Proliferator Activated Receptor δ (PPARδ) agonists, e.g. 2-(2-methyl-4-((4-methyl-2-(4-(trifluoromethyl) phenyl)thiazol-5-yl)methylthio)phenoxy) acetic acid (GW1516, GW501516);
5.2 Insulins and insulin-mimetics;
5.3 Meldonium;
5.4 Trimetazidine.

S5 DIURETICS AND MASKING AGENTS

The following diuretics and masking agents are prohibited, as are other substances with a similar chemical structure or similar biological effect(s).

Including, but not limited to:

- Desmopressin; probenecid; plasma expanders, e.g. intravenous administration of albumin, dextran, hydroxyethyl starch and mannitol.
- Acetazolamide; amiloride; bumetanide; canrenone; chlortalidone; etacrynic acid; furosemide; indapamide; metolazone; spironolactone; thiazides, e.g. bendroflumethiazide, chlorothiazide and hydrochlorothiazide; triamterene and vaptans, e.g. tolvaptan.

Except:

- Drospirenone; pamabrom; and ophthalmic use of carbonic anhydrase inhibitors (e.g. dorzolamide, brinzolamide);
- Local administration of felypressin in dental anaesthesia.

The detection in an *Athlete's Sample* at all times or *In-Competition*, as applicable, of any quantity of the following substances subject to threshold limits: formoterol, salbutamol, cathine, ephedrine, methylephedrine and pseudoephedrine, in conjunction with a diuretic or masking agent, will be considered as an *Adverse Analytical Finding (AAF)* unless the *Athlete* has an approved *Therapeutic Use Exemption (TUE)* for that substance in addition to the one granted for the diuretic or masking agent.

PROHIBITED METHODS

M1 MANIPULATION OF BLOOD AND BLOOD COMPONENTS

The following are prohibited:

1. The *Administration* or reintroduction of any quantity of autologous, allogenic (homologous) or heterologous blood, or red blood cell products of any origin into the circulatory system.

2. Artificially enhancing the uptake, transport or delivery of oxygen.
Including, but not limited to:
Perfluorochemicals; efaproxiral (RSR13) and modified haemoglobin products, e.g. haemoglobin-based blood substitutes and microencapsulated haemoglobin products, excluding supplemental oxygen by inhalation.

3. Any form of intravascular manipulation of the blood or blood components by physical or chemical means.

M2 CHEMICAL AND PHYSICAL MANIPULATION

The following are prohibited:

1. *Tampering*, or *Attempting to Tamper*, to alter the integrity and validity of *Samples* collected during *Doping Control*.
Including, but not limited to:
Urine substitution and/or adulteration, e.g. proteases.

2. Intravenous infusions and/or injections of more than a total of 100 mL per 12 hour period except for those legitimately received in the course of hospital treatments, surgical procedures or clinical diagnostic investigations.

M3 GENE DOPING

The following, with the potential to enhance sport performance, are prohibited:

1. The use of polymers of nucleic acids or nucleic acid analogues.

2. The use of gene editing agents designed to alter genome sequences and/or the transcriptional or epigenetic regulation of gene expression.

3. The use of normal or genetically modified cells.

SUBSTANCES & METHODS
PROHIBITED *IN-COMPETITION*

IN ADDITION TO THE CATEGORIES S0 TO S5 AND M1 TO M3 DEFINED ABOVE, THE FOLLOWING CATEGORIES ARE PROHIBITED *IN-COMPETITION*:

PROHIBITED SUBSTANCES

S6 STIMULANTS

All stimulants, including all optical isomers, e.g. *d*- and *l*- where relevant, are prohibited.

Stimulants include:

a: Non-Specified Stimulants:

Adrafinil;
Amfepramone;
Amfetamine;
Amfetaminil;
Amiphenazole;
Benfluorex;
Benzylpiperazine;
Bromantan;
Clobenzorex;
Cocaine;
Cropropamide;
Crotetamide;
Fencamine;
Fenetylline;
Fenfluramine;
Fenproporex;
Fonturacetam [4-phenylpiracetam (carphedon)];
Furfenorex;
Lisdexamfetamine;
Mefenorex;
Mephentermine;
Mesocarb;
Metamfetamine(*d*-);
p-methylamphetamine;
Modafinil;
Norfenfluramine;
Phendimetrazine;
Phentermine;
Prenylamine;
Prolintane.

A stimulant not expressly listed in this section is a *Specified Substance*.

b: Specified Stimulants.

Including, but not limited to:

1,3-Dimethylbutylamine;
4-Methylhexan-2-amine (methylhexaneamine);
Benzfetamine;
Cathine**;
Cathinone and its analogues, e.g. mephedrone, methedrone, and α - pyrrolidinovalerophenone;
Dimethylamphetamine;
Ephedrine***;
Epinephrine**** (adrenaline);
Etamivan;
Etilamfetamine;
Etilefrine;
Famprofazone;
Fenbutrazate;
Fencamfamin;
Heptaminol;
Hydroxyamfetamine (parahydroxyamphetamine);
Isometheptene;
Levmetamfetamine;
Meclofenoxate;
Methylenedioxymethamphetamine;
Methylephedrine***;
Methylphenidate;
Nikethamide;
Norfenefrine;
Octopamine;
Oxilofrine (methylsynephrine);
Pemoline;
Pentetrazol;
Phenethylamine and its derivatives;
Phenmetrazine;
Phenpromethamine;
Propylhexedrine;
Pseudoephedrine*****;

Selegiline;
Sibutramine;
Strychnine;
Tenamfetamine (methylenedioxyamphetamine);
Tuaminoheptane;

and other substances with a similar chemical structure or similar biological effect(s).

Except:

- Clonidine;
- Imidazole derivatives for topical/ophthalmic use and those stimulants included in the 2018 Monitoring Program*.

* Bupropion, caffeine, nicotine, phenylephrine, phenylpropanolamine, pipradrol, and synephrine: These substances are included in the 2018 Monitoring Program, and are not considered *Prohibited Substances*.

** Cathine: Prohibited when its concentration in urine is greater than 5 micrograms per milliliter.

*** Ephedrine and methylephedrine: Prohibited when the concentration of either in urine is greater than 10 micrograms per milliliter.

**** Epinephrine (adrenaline): Not prohibited in local administration, e.g. nasal, ophthalmologic, or co-administration with local anaesthetic agents.

***** Pseudoephedrine: Prohibited when its concentration in urine is greater than 150 micrograms per milliliter.

S7 NARCOTICS

The following narcotics are prohibited:

Buprenorphine;
Dextromoramide;
Diamorphine (heroin);
Fentanyl and its derivatives;
Hydromorphone;
Methadone;
Morphine;
Nicomorphine;
Oxycodone;
Oxymorphone;
Pentazocine;
Pethidine.

S8 CANNABINOIDS

The following cannabinoids are prohibited:

- Natural cannabinoids, e.g. cannabis, hashish and marijuana,
- Synthetic cannabinoids e.g. Δ9-tetrahydrocannabinol (THC) and other cannabimimetics.

Except:

- Cannabidiol.

S9 GLUCOCORTICOIDS

All glucocorticoids are prohibited when administered by oral, intravenous, intramuscular or rectal routes.

Including but not limited to:

Betamethasone;
Budesonide;
Cortisone;
Deflazacort;
Dexamethasone;
Fluticasone;
Hydrocortisone;
Methylprednisolone;
Prednisolone;
Prednisone;
Triamcinolone.

SUBSTANCES PROHIBITED IN PARTICULAR SPORTS

P1 BETA-BLOCKERS

Beta-blockers are prohibited *In-Competition* only, in the following sports, and also prohibited *Out-of-Competition* where indicated.

- Archery (WA)*
- Automobile (FIA)
- Billiards (all disciplines) (WCBS)
- Darts (WDF)
- Golf (IGF)
- Shooting (ISSF, IPC)*
- Skiing/Snowboarding (FIS) in ski jumping, freestyle aerials/halfpipe and snowboard halfpipe/big air
- Underwater sports (CMAS) in constant-weight apnoea with or without fins, dynamic apnoea with and without fins, free immersion apnoea, Jump Blue apnoea, spearfishing, static apnoea, target shooting, and variable weight apnoea.

*Also prohibited *Out-of-Competition*

Including, but not limited to:

Acebutolol;
Alprenolol;
Atenolol;
Betaxolol;
Bisoprolol;
Bunolol;
Carteolol;
Carvedilol;
Celiprolol;
Esmolol;
Labetalol;
Levobunolol;
Metipranolol;
Metoprolol;
Nadolol;
Oxprenolol;
Pindolol;
Propranolol;
Sotalol;
Timolol.

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U.S. ANTI-DOPING AGENCY

PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING

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UNITED STATES ANTI-DOPING AGENCY PROTOCOL FOR OLYMPIC AND PARALYMPIC MOVEMENT TESTING

Effective as revised January 1, 2015

The provisions of the United States Anti-Doping Agency ("USADA") Protocol for Olympic and Paralympic Movement Testing (as amended from time to time, the "Protocol" or "USADA Protocol") are intended to implement the requirements of the World Anti-Doping Code (the "*Code*")[1] on a national basis within the United States. As required by the *Code* and United States Olympic Committee ("USOC") National Anti-Doping Policies ("NADP"), all United States National Governing Bodies ("NGBs")[2] must comply, in all respects, with this Protocol and shall be deemed to have incorporated the provisions of this Protocol into their rulebooks as if they had set them out in full therein.

1. USADA's Relationship with the United States Olympic Committee

USADA is an independent legal entity not subject to the control of the USOC and for purposes of the *Code* and various World Anti-Doping Agency ("*WADA*") *International Standards*, including the International Standard for Testing and Investigations (the "ISTI"), is the *National Anti-Doping Organization* ("*NADO*") for the United States of America. The USOC has contracted with USADA to conduct drug *Testing*, manage test results, investigate potential violations of anti-doping rules, and adjudicate disputes involving anti-doping rule violations for *Participants* in the Olympic and Paralympic movements and to provide educational information to those *Participants* who are affiliated with NGBs. For purposes of transmittal of information by USADA, the USOC is USADA's client. However, the USOC has authorized USADA to transmit information simultaneously to the relevant NGB, International Federation ("IF"), International Olympic Committee ("IOC"), International Paralympic Committee ("IPC"), *WADA* and the involved *Athlete* or other *Person*, as appropriate. USADA's jurisdiction is not limited by its contract with the USOC and USADA has full authority to undertake all activities permitted by its Articles of Incorporation and Bylaws.

2. USADA's Relationship with Other Clients

In addition to providing services to the USOC and *Participants* in the Olympic and Paralympic movements within the United States, USADA also provides *Doping Control* services for Olympic movement and non-Olympic movement sporting bodies on a contract basis.

[1] Capitalized and italicized terms have the meaning set forth in the Definitions Sections of the *Code* and the ISTI.

[2] For the purposes of this Protocol, the term "NGB" includes national governing bodies of individual sports recognized by the USOC, Olympic Sport Organizations, Pan American Sport Organizations and Paralympic Sport Organizations recognized by the USOC and High Performance Management Organizations that have contracts with the USOC to administer Paralympic Sports.

3. Athletes Subject to Testing by USADA and the USADA Protocol

The USOC, NGBs, other sports organizations and the *Code* authorize USADA to test, investigate and conduct other anti-doping activities concerning the following *Athletes*:

a. Any *Athlete* who is a member or license holder of a NGB;

b. Any U.S. *Athlete* who is a member of, or the recipient of a license from an IF or other *Code Signatory* or a member of a *Signatory*,

c. Any *Athlete* by virtue of participation in (including registration for) an *Event* or *Competition* in the United States or which is organized or sanctioned by the USOC or NGB;

d. Any *Athlete* by virtue of application for (including participation in any qualifying *Event* or other step in the selection process), or selection to, a U.S. national, Olympic, Paralympic, Pan American, Parapan American, Youth Olympic team or other team representing the USOC or NGB in international *Competition*;

e. Any *Athlete* who has applied for a change of sport nationality to the United States;

f. Any foreign *Athlete* who is present in the United States;

g. Any *Athlete* by virtue of receipt of benefits from the USOC or NGB;

h. Any *Athlete* by virtue of registration for or use of any USOC training center, training site or other facility;

i. Any *Athlete* who has given his/her consent to *Testing* by USADA;

j. Any U.S. *Athlete* who has submitted a *Whereabouts Filing* to USADA or an IF within the previous twelve (12) months and has not given his or her NGB and USADA written notice of retirement;

k. Any *Athlete* who is included in the USADA *Registered Testing Pool* ("USADA *RTP*");

l. Any U.S. *Athlete* or foreign *Athlete* present in the United States who is serving a period of *Ineligibility* on account of an anti-doping rule violation and who has not given prior written notice of retirement from all sanctioned *Competition* to the applicable NGB and USADA, or the applicable foreign anti-doping agency or foreign sport association;

m. Any *Athlete* USADA is *Testing* under authorization from the USOC, NGB, IF, any *NADO*, *WADA*, the IOC, the IPC, any other *Anti-Doping Organization* ("*ADO*"), any other sports organization, or the organizing committee of any *Event* or *Competition*; or

n. Any *Athlete* whom USADA is entitled to test under the rules of any *ADO* or sports organization.

Of all of the *Athletes* falling within the scope of section 3 above, the *Athletes* included in subsection (k) shall be deemed *National-Level Athletes* for purposes

of these Anti-Doping Rules. However, if any such *Athletes* are classified by their respective IFs as *International-Level Athletes*, they shall be considered *International-Level Athletes* (and not *National-Level Athletes*) for purposes of these Anti-Doping Rules as well.

Pursuant to Article 5.2.4 of the *Code*, *WADA* shall also have *In-Competition* and *Out-of-Competition Testing Authority* over any of the above-mentioned *Athletes*.

USADA will not allow the *Testing* process to be used to harass any *Athlete*.

Athletes subject themselves to USADA's authority through their participation in sport as set forth in the USOC NADP and as provided in the *Code* and the rules of various sports organizations.

4. Application of USADA Protocol to Athlete Support Personnel and Other Persons

Athlete Support Personnel subject themselves to USADA's authority through their participation in sport as set forth in the USOC NADP and as provided in the *Code* and the rules of various sports organizations. Furthermore, USADA has authority to conduct anti-doping activities, including, but not limited to, information processing and disclosure, investigation and results management in relation to any other *Person* without limitation.

a. In light of the foregoing, this Protocol shall also apply to:
   i. All *Athlete Support Personnel* and other *Person*s who are employed or credentialed by the USOC or who are members of any NGB and/or of member or affiliate organizations or licensees of any NGB (including any clubs, teams, associations or leagues);
   ii. All *Athlete Support Personnel* or other *Person*s participating in any capacity in *Event*s, *Competition*s and other activities organized, authorized or recognized by the USOC, any NGB or any NGB member, affiliate organization or licensee (including any clubs, teams, associations or leagues), wherever held;
   iii. Any *Athlete Support Person* or other *Person* who is assisting any *Athlete*, team or *Athlete Support Person* in connection with any *Event* or *Competition* in which USADA is conducting *Doping Controls* or in connection with any sport in which USADA has authority to conduct *Out-of-Competition* or *In-Competition Testing*;
   iv. Any *Athlete Support Person* or other *Person* who is subject to USADA's investigatory authority and/or USADA's results management authority by operation of the rules of any IF or other sports organization; and
   v. Any other *Athlete Support Person* or other *Person* who, by virtue of a contractual arrangement or otherwise, is subject to the jurisdiction of any NGB or USOC for purposes of anti-doping; whether or not such individual is a citizen or resident of the United States.

b. To be a member of any NGB and/or of member or affiliate organizations or licensees of any NGB, or to be eligible to assist any participating *Athlete* in any *Event*, *Competition* or other activity organized, authorized or recognized by the USOC, any NGB or any NGB member, affiliate organization or licensee (including any clubs, teams, associations or leagues), a *Person* must agree to be bound by and to comply with this Protocol. Accordingly, by becoming such a member or by so assisting, an *Athlete Support Person* shall be deemed to have agreed:
   i. To be bound by and to comply strictly with this Protocol;
   ii. To submit to the authority of the USOC, the NGB and USADA to apply, police and enforce this Protocol;
   iii. To provide all requested assistance to the NGB, USOC and USADA (as applicable) in the application, policing and enforcement of this Protocol, including (without limitation) cooperating fully with any investigation, results management and exercise, and/or proceeding being conducted pursuant to this Protocol in relation to any potential anti-doping rule violation(s);
   iv. To submit to the jurisdiction of any hearing body convened under this Protocol to hear and determine the existence of any potential anti-doping rule violation(s) and related issues arising under this Protocol;
   v. To submit to the jurisdiction of any appellate body convened under this Protocol to hear and determine appeals made pursuant to this Protocol; and
   vi. Not to bring any proceedings in any court or other forum that are inconsistent with the foregoing submission to the jurisdiction of the hearing or appellate bodies referenced in subsections 4(b)(iv) and 4(b)(v) above.

For the avoidance of doubt, nothing in this Protocol shall be interpreted as limiting the functions and obligations of USADA as a *Signatory* to the *Code*. Nothing in this Protocol prevents USADA from undertaking *Doping Control*, results management and/or any other anti-doping activity in accordance with any agreement or arrangement with any other *ADO*, IF, or other *Code Signatory*, or in accordance with any right or obligation arising under the *Code*.

5. Choice of Rules

In conducting *Testing* and results management under this Protocol, USADA will apply the following rules and principles:

a. Articles of the *Code* set forth in **Annex A**, which is incorporated by reference into the USADA Protocol, shall apply in all cases.
b. The selection and collection procedures set forth in sections 6, 7 & 9 herein shall apply to all *Testing* conducted by USADA unless different procedures are agreed to between USADA and the party requesting the test.

c. USADA shall be responsible for results management of the following: (1) tests initiated by USADA, unless otherwise referred by USADA to a foreign sports organization having jurisdiction over the *Athlete* or other *Person*, (2) all other tests for which the applicable IF rules require the initial adjudication to be done by a domestic body (if responsibility for results management is accepted by USADA), and (3) other potential violations of **Annex A**, the applicable IF's anti-doping rules, the USOC NADP, or the USADA Protocol involving any *Athlete* described in section 3 of this Protocol, or any *Athlete Support Personnel* or other *Person*s described in section 4 including, without limitation, all potential violations discovered by USADA, unless otherwise referred by USADA to a foreign sports organization having jurisdiction over the *Athlete* or other *Person*. Where, pursuant to an agreement, USADA executes tests initiated by an IF, regional or continental sports organization or other Olympic movement sporting body, other than the USOC or NGB, then results management shall be governed by the USADA Protocol unless otherwise specified in the *Testing* agreement.

d. Any procedural rule of any entity for which USADA is conducting *Testing* or results management which is inconsistent with this Protocol shall be superseded by this Protocol.

e. The USOC has adopted the USOC NADP which affects *Athletes*' or other *Person*s' eligibility for USOC teams and benefits.

6. *Selection of Athletes to be Tested In-Competition*

Subject to the jurisdictional limitations for *Event Testing* set out in Article 5.3 of the *Code*, USADA shall have the authority to determine which *Athletes* will be selected for *Testing* in all *Event*s or *Competition*s tested by USADA. In making this determination, USADA may follow NGB or IF selection criteria when available and will include, at a minimum, the selection formulas or requests for target selection of particular *Athletes* which are proposed by the USOC or a particular NGB or IF. Notwithstanding the foregoing sentence, but subject to the jurisdictional limitations for *Event Testing* set out in Article 5.3 of the *Code*, USADA retains the right to test any *Athlete* subject to *Testing* as provided in section 3 of this Protocol that it chooses with or without cause or explanation.

7. *Selection of Athletes to be Tested Out-of-Competition*

In addition to *WADA*'s right to conduct *Out-of-Competition Testing* as provided in Article 5.2.4 of the *Code*, USADA shall have the authority to determine which *Athletes* will be selected for *Out-of-Competition Testing* by USADA. In making this determination, USADA will carefully consider selection formulas or requests for target selection of particular *Athletes* which are proposed by the USOC or a particular NGB. USADA retains the right to test any *Athlete* subject to *Testing* as provided in section 3 that it chooses, with or without cause or explanation.

8. *USADA Registered Testing Pool*

Unless otherwise agreed by USADA, at least quarterly each NGB will provide USADA with an updated list of *Athletes*, proposed by the NGB, to be included in the USADA *RTP*. With respect to each *Athlete* on such list and such additional *Athlete*s as may be designated by USADA for inclusion in the USADA *RTP*, the NGB will provide USADA with initial contact information which shall, at a minimum, include accurate residential, mailing and email addresses (if available) and phone numbers for each *Athlete* designated for inclusion in the USADA *RTP*. After USADA notifies the *Athlete* to inform him or her of the *Athlete*'s inclusion in the USADA *RTP* it shall be the responsibility of each individual *Athlete* to submit to USADA his or her *Whereabouts Filing* and thereafter to provide USADA with updated information specifying his or her whereabouts. USADA shall also inform *Athletes* when they are removed from the USADA *RTP*.

The information provided on each *Whereabouts Filing* and/or change of plan form must comply with requirements set forth in the ISTI. Submission of each *Whereabouts Filing* shall be accomplished electronically via USADA's website or through an alternative means provided or approved by USADA.

Within the timeframe established by USADA after notification of inclusion within the USADA *RTP* and thereafter prior to the submission of the *Whereabouts Filing* for the first quarter in each calendar year, each *Athlete* in the USADA *RTP* must successfully complete the USADA online education module or an alternative education program provided or approved by USADA before completing their next required *Whereabouts Filing*.

USADA shall make available to the USOC a list of all U.S. *Athletes* in the USADA *RTP* and shall make available to NGBs a list of the U.S. *Athletes* in their respective sports who are enrolled in the USADA *RTP*.

9. *Sample Collection*

Sample collection by USADA, and third parties authorized by USADA to collect *Samples* for USADA, including other *ADO*s pursuant to bilateral or multilateral agreements, will conform to the standards set forth in the ISTI. As provided in the *Code* and ISTI, a departure from the ISTI standards will not necessarily invalidate a *Sample* or other related evidence.

10. *Laboratory Analysis*

Samples collected by USADA shall be analyzed in *WADA*-accredited laboratories or as otherwise approved by *WADA* for anti-doping purposes only. In analyzing *Samples* for USADA, *WADA*-accredited laboratories shall follow Article 6 of the *Code* set forth in **Annex A** and the established *WADA* International Standard for Laboratories ("ISL"). As provided in the *Code* and ISL, a departure from the ISL standards will not necessarily invalidate a *Sample* result or other related evidence.

11. Notification

USADA will provide the following notification with respect to each *Sample* collected by USADA:

a. Upon receipt of a negative laboratory report USADA will promptly make that result available to the USOC, and NGB, as applicable, or to the sports organization, *Event* organizer or *ADO* for which USADA conducted the test. The result will also be made available to the *Athlete* at the address on the *Whereabouts Filing* on file or if no form is on file to the address on the Doping Control Official Record ("DCOR") or other form signed by the *Athlete* at the time of notification for *Doping Control* and/or at the time of *Sample* collection and processing.

b. Upon receipt from the laboratory of an A *Sample Adverse Analytical Finding* USADA will promptly conduct a review to determine whether an applicable Therapeutic Use Exemption ("*TUE*") has been granted or will be granted or there is any apparent departure from the ISTI or ISL that caused the *Adverse Analytical Finding*. If this review does not reveal an applicable *TUE* or departure from the applicable standards, USADA will promptly notify, as appropriate, the USOC, NGB, IF, *WADA* and other sports organization, *Event* organizer or *ADO* for which USADA conducted the test and the *Athlete* at the address on the *Whereabouts Filing* on file, or if no form is on file, at the address on the DCOR and shall advise the *Athlete* of the date, time and place on which the laboratory will conduct the B *Sample* analysis. The *Athlete* may attend the B *Sample* analysis accompanied by a representative, or may have a representative appear on his or her behalf, at the expense of the *Athlete*. Except as provided in sections 14 and 15 of this Protocol, prior to the B *Sample* opening, USADA shall provide to the *Athlete* the A *Sample* laboratory documentation as set forth in **Annex B**, and copies of the Protocol and the *Code*. In any correspondence offering the *Athlete* the opportunity to waive *Testing* of the B *Sample*, USADA shall include the language set forth in **Annex E**.

As more fully explained in section 14 below, in all cases where an *Athlete* has been notified of an anti-doping rule violation that does not result in a mandatory *Provisional Suspension* under Article 7.9.1 of the *Code*, the *Athlete* shall be offered the opportunity to accept a *Provisional Suspension* pending the resolution of the matter.

c. Upon receipt of the laboratory's B *Sample* report USADA shall promptly give notice of the result to the *Athlete*, the USOC, NGB, IF, *WADA* and other sports organization, *Event* organizer or *ADO* for which USADA conducted the test. If the B *Sample* analysis confirms the A *Sample* analysis USADA shall then provide to the *Athlete* the B *Sample* documentation package as set forth in **Annex C**. The laboratory shall not be required to produce any documentation in addition to that provided for in **Annexes B and C** unless ordered to do so by an arbitrator(s) during adjudication.

d. Upon receipt from the laboratory of an *Atypical Finding*, USADA will promptly conduct a review to determine whether an applicable *TUE* has been granted or will be granted, whether there is any apparent departure from the ISTI or ISL that caused the *Atypical Finding* and whether further investigation is required should the aforementioned review not reveal an applicable *TUE* or departure that caused the *Atypical Finding*. Except as provided below, USADA is not required to provide notice of an *Atypical Finding* until after USADA has completed its investigation to determine whether the *Atypical Finding* will be brought forward as an *Adverse Analytical Finding*. Prior to a determination concerning whether the *Atypical Finding* will be brought forward as an *Adverse Analytical Finding* USADA may provide notice to other sport organizations of an *Atypical Finding* and of the current progress of any investigation pertaining to the *Atypical Finding* in the following situations:

   i. If USADA determines that the B *Sample* should be analyzed prior to the conclusion of USADA's investigation, USADA will provide notice to the *Athlete*, USOC, NGB, IF, *WADA* and other sports organization, *Event* organizer or *ADO* for which USADA conducted the test as applicable and permit the same opportunity to attend the B *Sample* opening and analysis as if the A *Sample* finding had been an *Adverse Analytical Finding*;

   ii. If USADA receives a request from the USOC, NGB, or another sport organization responsible for meeting an imminent deadline for selecting team members for an *International Event*, or from a *Major Event Organization* shortly before one of its *International Event*s to disclose whether any *Athlete* identified on a list provided by the *Major Event Organization* or USOC, NGB or other sport organization responsible for meeting an imminent deadline for selecting team members has a pending *Atypical Finding*, USADA may identify any such *Athlete* with an *Atypical Finding* after first providing notice of the *Atypical Finding* to the *Athlete*.

e. In circumstances where USADA is conducting *Testing* for an IF, *ADO*, regional or continental sports organization, other Olympic movement sporting body or other sports organization or *Event* organizer, the notification described in this section shall be made as provided herein unless specified otherwise in the *Testing* agreement.

f. Before giving an *Athlete* or other *Person* notice of an asserted anti-doping rule violation, USADA shall refer to *ADAMS* or another system approved by *WADA* and contact *WADA* and other relevant *ADOs* to determine whether any prior anti-doping rule violation exists.

g. If USADA determines that an *Athlete* or other *Person* may have committed an anti-doping rule violation as described in **Annex A** other than a positive test, then at such time as USADA initiates the Anti-Doping Review Board ("Review Board") process under section 13 of the Protocol, seeks an involuntary *Provisional Suspension* pursuant to section 14 of the Protocol, or commences results management pursuant to section 15 or 16 of the Protocol, USADA shall provide notice of such potential violation to the *Athlete* or other *Person*, and as appropriate, to the USOC, NGB, IF, *WADA* and other sports organization, *Event* organizer or *ADO*.

h. In the event that USADA decides not to proceed upon any potential anti-doping rule violation either prior or subsequent to submission to the Review Board or decides not to bring forward any *Adverse Analytical Finding* or *Atypical Finding* as an anti-doping rule violation, USADA shall so notify the *Athlete*, and as appropriate, the USOC, NGB, IF, *WADA* and other sports organization, *Event* organizer or *ADO* as set forth in Article 14.2 of the *Code*.

i. Notice to an *Athlete* or other *Person* may be accomplished either through actual notice or constructive notice. Constructive notice is sufficient for all purposes for which notification is required under this Protocol.

   i. Actual notice may be accomplished by any means that conveys actual knowledge of the matter to the *Athlete* or other *Person*, provided the *Athlete* or other *Person* acknowledges receipt of the notice. Actual notice shall be effective upon delivery.

   ii. Constructive notice may be accomplished by third party courier, U.S. Postal mail or by email. Notice via third party courier or U.S. Postal mail shall be sent to the *Athlete* or other *Person*'s most recent mailing address on file with USADA or on file with the *Athlete* or other *Person*'s NGB. Also, if the *Athlete* or other *Person* has provided USADA with the *Athlete* or other *Person*'s designated representative, notice may be sent to that *Person*'s most recent mailing address. Notice shall be achieved if the third party courier indicates delivery or if the U.S. Postal mail is not returned. Notice via email shall be sent to the *Athlete* or other *Person*'s most recent email address on file with USADA or on file with the *Athlete* or other *Person*'s NGB. Also, if the *Athlete* or other *Person* has provided USADA with the *Athlete* or other *Person*'s designated representative, notice may be sent to that *Person*'s most recent email address. Notice shall be achieved if USADA does not receive a return communication notice indicating that the email was not delivered. Constructive notice shall be effective three (3) business days after delivery by the third party courier, five (5) business days after depositing the notice with the U.S. Postal Service, or three (3) business days after sending the email.

   iii. If constructive notice cannot be accomplished pursuant to section 11(i)(ii) above, then notice may be achieved by actual notice to the *Athlete* or other *Person*'s NGB. Such notice shall be effective three (3) business days after delivery.

12. *Results Management*

The results management process is designed to balance the interest of clean *Athletes* in not competing against another *Athlete* or *Athletes* facing an unresolved doping charge with the opportunity of *Athletes* and other *Persons* who have been charged with an anti-doping rule violation to have an opportunity for a hearing prior to being declared *Ineligible* to participate in sport. Recognizing that athletic careers are short and the interest in the prompt resolution of anti-doping disputes is strong, the procedures in this Protocol are intended to facilitate the prompt and fair resolution of anti-doping matters.

Similarly, the interest of *Athletes*, other affected *Persons* and sports organizations in resolving pending anti-doping matters prior to a "Protected Competition"[3] is frequently strong. Therefore, the results management process in this Protocol includes an Expedited Track providing for the prompt handling of expedited cases and provides that USADA may shorten any time period set forth in this Protocol and require that any hearing be conducted or the results of any hearing be *Publicly Reported* on or before a certain date or time where doing so is reasonably necessary to resolve an *Athlete*'s or other *Person*'s eligibility before a Protected Competition or other significant *Competition*.

As provided for in the *Code*, after an *Athlete* receives notice of an *Adverse Analytical Finding* for a *Prohibited Substance* other than a *Specified Substance* in his or her A *Sample* or that a case is being brought forward on the basis of an *Atypical Analytical Finding*, an *Atypical Passport Finding* or *Adverse Passport Finding*, a *Provisional Suspension* must be imposed promptly upon the *Athlete* after notice and an opportunity to request a *Provisional Hearing*, which may be held after the *Provisional Suspension* is imposed. Therefore, in the event an *Athlete* with an *Adverse Analytical Finding* for a *Prohibited Substance* other than a *Specified Substance* in his or her A *Sample*, or an *Atypical Passport Finding* or *Adverse Passport Finding* does not promptly and voluntarily accept a *Provisional Suspension* the results management process in this Protocol provides for a *Provisional Hearing* or an expedited hearing process or both.

13. *Results Management/Anti-Doping Review Board Track*

Except as provided in sections 14 and 15 of this Protocol, when USADA receives a laboratory report confirming an *Adverse Analytical Finding* or concludes after investigation that an *Atypical Finding* was the result of the *Administration* of a *Prohibited Substance* or *Use* of a *Prohibited Method*, or when USADA has otherwise determined that an anti-doping rule violation may have occurred, such as admitted doping, refusal to test, evasion of *Doping Control*, *Use*, *Possession*, *Administration*, *Trafficking*, *Complicity*, Prohibited Association, a *Whereabouts Failure* or other violation or attempted violation of **Annex A**, IF rules or the USOC NADP, then USADA shall address the case through the following results management procedures:

a. The Review Board shall be comprised of experts independent of USADA with medical, technical and legal knowledge of anti-doping matters. The Review Board members shall be appointed for two-year terms by the USADA Board of Directors and shall, unless notified otherwise, remain members until their successors have been duly appointed.

b. In accordance with section 13(d)(i) below, and except as provided for in

[3] The term "Protected Competition" shall have the meaning set forth in the USOC's Bylaws.

sections 14, 15 and 16 of this Protocol, the Review Board shall review all *Sample* test results reported by the laboratory as an *Adverse Analytical Finding* or as an *Atypical Finding* and as to which USADA determines that there exists no valid *TUE*, or other sufficient reason not to bring the case forward as a potential anti-doping rule violation. Such review shall be undertaken by between three and five Review Board members appointed in each case by USADA's Chief Executive Officer ("CEO") and, in cases involving a positive A and B *Sample*, composed of at least one technical, one medical and one legal expert.

c. Except as provided in sections 14, 15 and 16 of this Protocol, the Review Board shall also review all potential anti-doping rule violations, including violations of **Annex A**, IF rules or the USOC NADP, not based on *Adverse Analytical Finding*s, which are brought forward by USADA. Review of potential violations other than *Adverse Analytical Finding*s shall be undertaken by three Review Board members appointed in each case by USADA's CEO.

d. Upon USADA's receipt of a laboratory B *Sample* report confirming an *Adverse Analytical Finding* (or immediately when analysis of the B *Sample* has been expressly waived by the *Athlete* or other *Person*), or when USADA determines that a potential violation of other applicable anti-doping rules has occurred, the following steps shall be taken:

   i. USADA's CEO shall appoint a Review Board as provided in sections 13(b) or 13(c) above.

   ii. The Review Board shall be provided the laboratory documentation and any additional information that USADA deems appropriate. Copies of the laboratory documentation and additional information shall be provided simultaneously to the *Athlete* or other *Person*. The *Athlete*'s or other *Person*'s name will not be provided to the Review Board by USADA and will be redacted from any documents submitted to the Review Board by USADA.

   iii. The *Athlete* or other *Person* shall be promptly notified that within ten (10) days of the date of notice (or within such reasonable shorter time period as USADA may set) he or she may submit to the Review Board, through USADA, any written materials for the Review Board's consideration.

   iv. The *Athlete* or other *Person* shall also be provided the name, telephone number, email address and website URL of the USOC Athlete Ombudsman.

   v. The Review Board shall be entitled to request additional information from either USADA or the *Athlete* or other *Person*.

   vi. Notwithstanding the foregoing, the process before the Review Board shall not be considered a "hearing." The Review Board shall only consider written submittals. The Review Board shall only consider whether there is sufficient evidence of an anti-doping rule violation to proceed to an arbitration hearing. All inferences and conflicts in the evidence shall be resolved in favor of the case being proceeding to an arbitration hearing. No matters regarding jurisdiction, USADA's investigation or proposed sanction length, or alleged degree of *Fault* or lack of *Fault* of the *Athlete* shall be considered by the Review Board. Submittals to the Review Board shall not be used in any further hearing or proceeding without the consent of the party making the submittal. No evidence concerning the proceeding before the Review Board, including but not limited to the composition of the Review Board, what evidence may or may have not been considered by it, its deliberative process or its recommendations shall be admissible in any further hearing or proceeding. Notwithstanding the foregoing, submittals to the Review Board may be used in further hearings or proceedings without the consent of the party making the submittal for purposes of impeachment of any prior inconsistent statements.

   vii. The Review Board shall consider the written information submitted to it and shall, by majority vote, make a signed, written recommendation to USADA whether or not there is sufficient evidence of an anti-doping rule violation to proceed to an arbitration hearing. USADA shall then communicate the Review Board's recommendation to the *Athlete* or other *Person*.

   viii. USADA shall also communicate the Review Board's recommendation to the USOC, NGB, IF and *WADA*.

   ix. The *Athlete* or other *Person* may elect to waive the Review Board process at any time and upon such an election USADA may waive the Review Board process if USADA concurs in the waiver.

e. The Review Board's recommendation shall not be binding on USADA.

f. Following receipt of the Review Board recommendation, or if the Review Board process was waived, USADA shall notify the *Athlete* or other *Person*, *WADA* and any sports organization(s) with a right to appeal pursuant to Article 13.2.3 of the *Code* in accordance with Article 14.2 of the *Code*, within ten (10) business days, in writing, whether USADA considers the matter closed or alternatively that an alleged anti-doping rule violation has occurred and that the matter will proceed pursuant to the adjudication process. The notice shall indicate what specific charges or alleged violations will be adjudicated and what sanction, consistent with **Annex A**, the IF rules, the USOC NADP, or the USADA Protocol, USADA is seeking to have imposed. The notice shall also include all of the information required by Article 14.1.3 of the *Code*, as well as a copy of the USADA Protocol and the American Arbitration Association ("AAA") Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the "Supplementary Procedures") attached as **Annex D** or a web link to those documents.

g. Within ten (10) days following the date of such notice, the *Athlete* or other *Person* must notify USADA in writing if he or she desires an arbitration hearing to contest the sanction sought by USADA. The *Athlete* or other *Person* shall be entitled to a five (5) day extension if requested within such ten (10) day period. If the sanction is not contested in writing within such ten (10) or fifteen (15) day period, then the sanction shall be communicated by USADA to the *Athlete* or other *Person*, USOC, NGB, IF and *WADA* and thereafter imposed by the NGB or other appropriate sporting body.

h. Such sanction shall not be challenged, reopened or subject to appeal unless the *Athlete* or other *Person* can demonstrate by a preponderance of the evidence that he or she did not receive either actual or constructive notice of the opportunity to contest the sanction. A claim that notice was not received must be raised within twenty-one (21) days of USADA's *Public Disclosure* of the sanction pursuant to section 18 of this Protocol, and shall be heard by the AAA.

i. An *Athlete* or other *Person* may also elect to avoid the necessity for a hearing by accepting the sanction proposed by USADA. In all cases where USADA has agreed with an *Athlete* or other *Person* to the imposition of a sanction without a hearing, USADA shall give notice thereof as set forth in Articles 14.1 and 14.2 of the *Code* to other *ADOs* with a right to appeal under Article 13.2.3 of the *Code*.

j. If the sanction is contested by the *Athlete* or other *Person*, then a hearing shall be conducted pursuant to the procedures set forth below in sections 16 and 17.

14. Provisional Suspension

Pursuant to Article 7.9.1 of the *Code*, in the event that the laboratory reports an *Adverse Analytical Finding* on an A *Sample* for a *Prohibited Substance* other than a "*Specified Substance*" within the meaning of Article 4.2.2 of the *Code*, USADA will notify the *Athlete* or other *Person*, in accordance with Article 7.3 of the *Code* and after it has conducted the review described in Articles 7.3 and 7.5 of the *Code*, that a *Provisional Suspension* shall be imposed unless the *Athlete* challenges the imposition of the *Provisional Suspension* by requesting, in writing, a *Provisional Hearing* within three (3) calendar days of USADA's notice. Such time period may be shortened by USADA if the *Athlete* or other *Person* intends to compete in a *Competition* that is scheduled within the three day period. For good cause, if established prior to the expiration of the challenge period, USADA may extend the period for a challenge of the *Provisional Suspension* by up to an additional four (4) calendar days. If the *Athlete* does not contest the *Provisional Suspension*, the *Provisional Suspension* will go into effect and the *Athlete*'s case will proceed on the Anti-Doping Review Board Track set forth in section 13 above. If the *Athlete* challenges the *Provisional Suspension* proposed by USADA, but a *Provisional Hearing* is not initiated as provided for below, the *Athlete*'s case will proceed on the Expedited Track set forth in section 15 below.

a. In the event that the laboratory reports an *Adverse Analytical Finding* on an A *Sample* for a *Prohibited Substance* other than a *Specified Substance* and USADA is unaware of a Protected Competition or significant *Competition* in which the *Athlete* may participate within the next forty-five (45) days, USADA may inform the *Athlete* of USADA's determination that a *Provisional Suspension* should be imposed and the *Athlete*'s right to request, in writing, that the AAA form an arbitration panel as provided in this Protocol and schedule a *Provisional Hearing* to be held within ten (10) days of USADA's notice or within such shorter time as specified by USADA. *Provisional Hearings* shall be held via conference call within the time frame specified by USADA and the sole issue to be determined by the panel at such a hearing will be whether USADA's decision that a *Provisional Suspension* should be imposed shall be upheld. USADA's decision to impose a *Provisional Suspension* shall be upheld if probable cause exists for USADA to proceed with a charge of an anti-doping rule violation against the *Athlete* or if the *Athlete* is unable to demonstrate that the potential violation resulted from the use of a *Contaminated Product*. To establish probable cause it shall not be necessary for any B *Sample* analysis to have been completed. Prior to any *Provisional Hearing* USADA shall provide to the *Athlete* any and all laboratory documentation in the possession of USADA for the *Sample* in question. If probable cause is found the panel shall uphold USADA's decision to impose a *Provisional Suspension* against the *Athlete*. The *Provisional Suspension* shall make the *Athlete Ineligible* to participate in any *Competition* or *Event* or from membership or inclusion upon any team organized or nominated by the USOC or any NGB and shall be in effect until the final hearing has been held and an award issued by an arbitration panel or until the earlier of one of the following events: USADA and the *Athlete* agree to a sanction, USADA withdraws its case against the *Athlete*, or the *Athlete* withdraws his or her request for arbitration or fails to contest his or her case resulting in imposition of a sanction.

b. If a *Provisional Suspension* is involuntarily imposed against an *Athlete* pursuant to the *Provisional Hearing* process set forth above, the *Athlete* shall be entitled to have his or her case heard pursuant to the Expedited Track set forth below if a written request for such expedited treatment is made to the *Provisional Hearing* panel within three (3) business days of the panel's decision to uphold USADA's decision to impose a *Provisional Suspension*.

c. In the event that USADA chooses not to impose a *Provisional Suspension* or if USADA imposes a *Provisional Suspension* and the *Athlete* presents credible evidence that the *Athlete* intends to participate in a Protected Competition or other significant *Competition* within forty-five (45) days, the *Provisional Hearing* process shall be bypassed and the case shall proceed directly to an expedited hearing as provided for in section 15 of this Protocol.

d. Nothing in this rule shall preclude any *Athlete* or other *Person* from voluntarily accepting a *Provisional Suspension* proposed by USADA for any alleged anti-doping rule violation. Upon acceptance of a *Provisional Suspension* and agreement by USADA a case may be shifted to the appropriate stage of the Anti-Doping Review Board Track at any time.

e. Pursuant to Article 7.10 of the *Code*, upon the acceptance or imposition of a *Provisional Suspension*, USADA shall give notice thereof as set forth in Articles 14.1 and 14.2 of the *Code* to other *ADOs* with a right to appeal under Article 13.2.3 of the *Code*.

15. Results Management / Expedited Track

When USADA receives a laboratory report of an *Adverse Analytical Finding* on an A *Sample* or USADA has evidence that an *Athlete* or other *Person Used*, *Possessed*, *Trafficked* or *Administered* a *Prohibited Substance* or *Prohibited Method* other than a *Specified Substance* and the *Athlete* or other *Person* believed to have committed the rule violation has not accepted a *Provisional Suspension* within the time period specified by USADA and is likely to participate in a Protected Competition or other significant *Competition* within forty-five (45) days, then USADA shall address the case through the following results management procedures if USADA determines that the case might not be concluded prior to the Protected Competition if administered on the Anti-Doping Review Board Track:

a. If applicable, the B *Sample* shall be analyzed by the laboratory at the earliest practicable time as scheduled by USADA. Notice of the date for the B *Sample* opening will be set forth in the notice informing the *Athlete* of his or her opportunity to accept a *Provisional Suspension* or request a *Provisional Hearing*.

b. Regardless of the status of any B *Sample* analysis, within three (3) business days of expiration of the period in which the *Athlete* or other *Person* must accept a *Provisional Suspension* in order to avoid handling of the *Athlete*'s or other *Person*'s case on the Expedited Track, the *Athlete* or other *Person* shall be deemed to have requested arbitration of their case and USADA shall notify the AAA in writing of the initiation of an expedited proceeding by USADA against the *Athlete* or other *Person* by filing a request for arbitration with the AAA.

c. The AAA shall immediately form an arbitration panel under the AAA's expedited procedures.

d. The panel shall complete and close the hearing and issue its written award within the time period identified by USADA as necessary to provide for orderly participation in Protected Competition by the *Athlete* or other *Person*, if eligible, and/or by any other potentially affected *Athletes*, other *Person*s or team, or if no Protected Competition is more imminent, within twenty-one (21) days of formation of the panel.

e. Nothing in this rule shall preclude any *Athlete* or other *Person* from voluntarily accepting the imposition of the *Provisional Suspension* by USADA. Upon acceptance of a *Provisional Suspension* and agreement by USADA and the *Athlete* or other *Person* a case may be shifted from the Expedited Track to the appropriate stage of the Anti-Doping Review Board Track at any time.

16. Expedited Procedures

USADA may eliminate the Review Board process or shorten any time period set forth in this Protocol and require that any hearing be conducted or the results of any hearing be *Publicly Reported* on or before a certain date or time where doing so is reasonably necessary to resolve an *Athlete*'s or other *Person*'s eligibility before a Protected Competition or other significant *Competition*. The shortened time periods shall continue to protect the right of the *Athlete* or other *Person* to a fair hearing and shall not prohibit the *Athlete*'s or other *Person*'s right to request three (3) arbitrators or choose a single arbitrator.

17. Hearings and Appeals

The following procedures apply to all hearings under this Protocol:

a. Without exception, absent the express consent of the parties, all hearings will take place in the United States before the AAA using the Supplementary Procedures. For purposes of this section 17(a), the parties will be USADA and the *Athlete* or other *Person*. Although the parties and witnesses may participate in any hearing remotely, absent the express consent of the parties, the arbitrator(s) must be physically situated in the United States in order to take part in a hearing. USADA may also invite the applicable IF and *WADA* to participate either as a party or as an observer. The *Athlete* or other *Person* shall have the sole right to request that the hearing be open to the public subject to such limitations as may be imposed by the arbitrator(s). For their information only, notice of the hearing date shall also be sent to the USOC, the USOC Athlete Ombudsman and the NGB. If the *Athlete* or other *Person* requests, the USOC Athlete Ombudsman shall be invited as an observer.

b. Subject to the filing deadline for an appeal filed by *WADA* as provided in Article 13.2.3 of the *Code*, the final award by the AAA arbitrator(s) may be appealed to the *CAS* within twenty-one (21) days of issuance of the final reasoned award or when an award on eligibility without reasons is deemed final as set forth below. If the AAA arbitrators issue an award on eligibility without reasons, such award shall be deemed final for purposes of appeal to *CAS* on the earlier of (a) issuance of the final reasoned award by the AAA Panel, or (b) thirty (30) days from issuance of the award without reasons. The appeal procedure set forth in Article 13.2 of **Annex A** shall apply to all appeals not just appeals by *International-Level Athletes* or other *Person*s. A *CAS* appeal shall be filed with the *CAS* Administrator, the *CAS* hearing will automatically take place in the United States and *CAS* shall conduct a review of the matter on appeal which, among other things, shall include the power to increase, decrease or void the sanctions imposed by the previous AAA Panel regardless of which party initiated the appeal. The regular *CAS* Appeal Arbitration Procedures apply. The decision of *CAS* shall be final and binding on all parties and shall not be subject to further review or appeal.

c. All administrative costs of USADA relating to the *Testing* and management of *Athletes*' *Samples* prior to a determination of *Ineligibility* will be borne by USADA. Administrative costs of the USADA adjudication process (AAA filing fee, AAA administrative costs, AAA arbitrator fees and costs) will be borne by the USOC.

d. If the *Athlete* or other *Person* files an appeal with *CAS*, the *CAS* filing fee will be paid by the *Athlete* or other *Person* and refunded to the *Athlete* by the USOC should the *Athlete* prevail on appeal. Apart from the filing fee, *CAS* may impose an award of costs and fees on any party pursuant to its rules. The USOC shall not be responsible for these costs and fees.

e. The results of all hearings, including written decisions, shall be communicated by USADA to the *Athlete* or other *Person*, the USOC, NGB, IF and *WADA* in accordance with Article 14.2 of the *Code*. The NGB and/or USOC shall impose any sanction resulting from the adjudication process. The NGB and/or the USOC shall not impose any sanctions until after the *Athlete* or other *Person* has had the opportunity for a hearing.

18. Confidentiality

Athletes and other *Person*s consent to USADA disclosing such information concerning the *Athlete* or other *Person*s to sports organizations as may be permitted by the *Code*, IF rules, the USOC NADP, this Protocol, the ISTI, or other law, rule or regulation, including the whereabouts information described in Articles 5.6 and 14.5 of the *Code*. For any disclosure which USADA is entitled to make to the USOC, USADA may, in addition, make such disclosure to the appropriate NGB or other appropriate USOC member organization.

USADA shall maintain on its website a searchable database which includes the identity of all *Athletes* tested by USADA under its Olympic, Paralympic, Pan American, Parapan American and Youth Olympic movements *Testing* program and the number of times each *Athlete* has been tested by USADA.

USADA shall not *Publicly Disclose* or comment upon any *Athlete*'s *Adverse Analytical Finding* or *Atypical Finding* or upon any information related to any alleged doping violation (including violations not involving an *Adverse Analytical Finding*) until after the *Athlete* or other *Person* (1) has been found to have committed an anti-doping rule violation in a hearing conducted under this Protocol, or (2) has failed to request a hearing within the time set forth in section 12(a) of this Protocol, or (3) has agreed in writing to the sanction sought by USADA. However, USADA may provide notification to the USOC, NGB, IF, *WADA*, an *Event* organizer or team selecting entity (or other sporting body ordering the test) as provided for in this Protocol. USADA does not control how information provided by USADA to the USOC, NGBs, IFs, *WADA* and other sports organizations is disseminated but will include statements to each organization requesting that any organization receiving such information keep it confidential until disclosed by USADA. USADA may comment publicly at any time on any aspect of the results management/adjudication process or the applicable rules without making specific reference to any *Athlete* or other *Person* alleged to have committed an anti-doping rule violation. USADA may also release aggregate statistics of *Testing* and adjudication results. In the event an *Athlete* or other *Person* or the *Athlete*'s or other *Person*'s representative(s) or others associated with the *Athlete* or other *Person* make(s) public comments about their case or the process involving the *Athlete* or other *Person* then USADA may respond publicly to such comments in whatever manner and to whatever extent USADA deems appropriate.

Unless USADA determines that non-disclosure or delayed disclosure is permitted under the *Code*, USADA shall *Publicly Report* the disposition of anti-doping matters no later than five (5) business days after*:* (1) it has been determined in a hearing in accordance with the Protocol that an anti-doping rule violation has occurred, (2) such hearing has been waived, (3) the assertion of an anti-doping rule violation has not been timely challenged, or (4) the *Athlete* or other *Person* has agreed in writing to the sanction sought by USADA. After an anti-doping rule violation has been established USADA may comment upon any aspect of the case. In all cases, the disposition shall be reported to the USOC, NGB, IF, *WADA* and, if applicable, the other sporting body referring the matter to USADA.

USADA shall also comply with the *Public Disclosure* requirements as described in Article 14.3 of the *Code* where those requirements are not specifically provided in these Rules.

19. Ineligibility

Any *Athlete* sanctioned by USADA, a NGB, an IF, another *Signatory* to the *Code* or by another body whose rules are consistent with the *Code* for the violation of any anti-doping rule, who receives a period of *Ineligibility* of less than a lifetime period of *Ineligibility*, shall be required to make themselves available for *Out-of-Competition Testing* and, in the discretion of USADA, may be enrolled in and required to comply with all requirements of the USADA *RTP* at any time during the period of the *Athlete*'s *Ineligibility*. The failure by an *Athlete* who has been enrolled in the USADA *RTP* to fully comply with USADA's whereabouts requirements may result in the extension of the *Athlete*'s *Ineligibility* or subject the *Athlete* to a further anti-doping rule violation and additional sanctions. Sanctioned *Athletes* shall also be required to bear the costs associated with any reinstatement tests conducted by USADA on him or her during the period of *Ineligibility* or thereafter.

Any *Athlete* who retires during a period of *Ineligibility* while enrolled in the USADA *RTP* and later desires to seek reinstatement or return to active participation in sport must give USADA notice of his or her intent to return from retirement and must comply with all USADA whereabouts requirements for members of the USADA *RTP*. Once the *Athlete* has provided all the whereabouts information required by USADA, USADA shall notify the *Athlete* of the date of the *Athlete*'s re-inclusion in the USADA *RTP*. The *Athlete* shall not be eligible to recover eligibility until the *Athlete* has been in the USADA *RTP* and fully complied with all requirements for participation in the *RTP*, including the duty to provide whereabouts information, for a period of time equal to the period of *Ineligibility* remaining as of the date the *Athlete* retired or for the period of time specified in the USOC NADP for an *Athlete*'s return to participation in sport following a retirement, whichever is longer. The *Athlete* must also comply with all applicable reinstatement requirements of the *Athlete*'s NGB(s) and IF(s).

20. Retirement

Any *Athlete* enrolled in the USADA *RTP* who wishes to be removed from the USADA *RTP* on account of retirement must promptly notify USADA and his or her NGB in writing in order for retirement from the USADA *RTP* to be effective. In addition, *Athletes* are responsible to comply with the individual retirement policies for the IF(s) in each sport in which he or she competes. The notice regarding retirement attached as **Annex F** shall be posted on the USADA website.

In accordance with Article 5.7 of the *Code*, any *Athlete* who retires from sport while included in USADA's *RTP* must make himself or herself available for *Testing* by giving six months prior written notice to USADA, the relevant IF and the *Athlete*'s NGB(s) prior to returning to active participation in sport at the International or National level and must comply with all USADA whereabouts requirements for members of the USADA *RTP*. *WADA*, in consultation with the relevant IF and USADA, may grant an exemption to the six-month written notice rule where the strict application of that rule would be manifestly unfair to an *Athlete*. This decision may be appealed under Article 13 of the *Code*. In addition, competitive results obtained in violation of Article 5.7.1 of the *Code* shall be *Disqualified*.

If an *Athlete* retires from sport while subject to a period of *Ineligibility* and then wishes to return to active *Competition* in sport, the *Athlete* shall not compete in *International Event*s or *National Event*s until the *Athlete* has made himself or herself available for *Testing* and provided notice in accordance with Article 5.7.2 of the *Code*.

21. Ownership and Use of Samples

All *Samples* collected by USADA shall be the property of USADA, but shall only be used for purposes outlined in this Protocol and in accordance with Article 6 of the *Code* set forth in **Annex A**.

22. Effective Date

The revisions to this Protocol incorporated herein shall go into effect on January 1, 2015. Revisions to the Protocol as previously published shall not apply retrospectively to matters pending before January 1, 2015 except as provided in Article 25 of the *Code*.

ANNEX A
WORLD ANTI-DOPING CODE ARTICLES

Articles from the World Anti-Doping* Code *that are referenced in the USOC Anti-Doping Policies and incorporated verbatim into the USADA Protocol for Olympic and Paralympic Movement Testing:

ARTICLE 1: DEFINITION OF DOPING

Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of the *Code*.

ARTICLE 2: ANTI-DOPING RULE VIOLATIONS

The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the *Prohibited List*.

The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in Athlete's Sample

2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1.

[Comment to Article 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability." An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under Article 10. This principle has consistently been upheld by CAS.]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed; or, where the *Athlete's* B *Sample* is analyzed and the analysis

of the *Athlete's* B *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's* A *Sample*; or, where the *Athlete's* B *Sample* is split into two bottles and the analysis of the second bottle confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the first bottle.

[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may in its discretion choose to have the B Sample analyzed even if the Athlete does not request the analysis of the B Sample.]

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the *Prohibited List*, the presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the *Prohibited List* or *International Standards* may establish special criteria for the evaluation of *Prohibited Substances* that can also be produced endogenously.

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Athlete Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1.

For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]

2.2.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body and that no *Prohibited Method* is *Used*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation for *Use* of a *Prohibited Substance* or a *Prohibited Method*.

2.2.2 The success or failure of the *Use* or *Attempted Use* of a *Prohibited Substance* or *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or *Prohibited Method* was *Used* or *Attempted* to be *Used* for an anti-doping rule violation to be committed.

[Comment to Article 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance or a Prohibited Method requires proof of intent on the Athlete's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the Strict Liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method.

An Athlete's Use of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of Article 2.1 regardless of when that substance might have been administered.)]

2.3 Evading, Refusing or Failing to Submit to Sample Collection

Evading *Sample* collection, or without compelling justification refusing or failing to submit to *Sample* collection after notification as authorized in applicable anti-doping rules.

[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. A violation of "failing to submit to Sample collection" may be based on either intentional or negligent conduct of the Athlete, while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete.]

2.4 Whereabouts Failures

Any combination of three missed tests and/or filing failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an *Athlete* in a *Registered Testing Pool*.

2.5 Tampering or Attempted Tampering with any part of Doping Control

Conduct which subverts the *Doping Control* process but which would not otherwise be included in the definition of *Prohibited Methods*. *Tampering* shall include, without limitation, intentionally interfering or attempting to interfere with a *Doping Control* official, providing fraudulent information to an *Anti-Doping Organization* or intimidating or attempting to intimidate a potential witness.

[Comment to Article 2.5: For example, this Article would prohibit altering identification numbers on a Doping Control form during Testing, breaking the B bottle at the time of B Sample analysis, or altering a Sample by the addition of a foreign substance. Offensive conduct towards a Doping Control official or other Person involved in Doping Control which does not otherwise constitute Tampering shall be addressed in the disciplinary rules of sport organizations.]

2.6 Possession of a Prohibited Substance or a Prohibited Method

2.6.1 *Possession* by an *Athlete In-Competition* of any *Prohibited Substance* or any *Prohibited Method*, or *Possession* by an *Athlete Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *Out-of-Competition* unless the *Athlete* establishes that the *Possession* is consistent with a Therapeutic Use Exemption ("*TUE*") granted in accordance with Article 4.4 or other acceptable justification.

2.6.2 *Possession* by an *Athlete Support Person In-Competition* of any *Prohibited Substance* or any *Prohibited Method*, or *Possession* by an *Athlete Support Person Out-of-Competition* of any *Prohibited Substance* or any *Prohibited Method* which is prohibited *Out-of-Competition* in connection with an *Athlete*, *Competition* or training, unless the *Athlete Support Person* establishes that the *Possession* is consistent with a *TUE* granted to an *Athlete* in accordance with Article 4.4 or other acceptable justification.

[Comment to Article 2.6.1 and 2.6.2: Acceptable justification would not include, for example, buying or Possessing a Prohibited Substance for purposes of giving it to a friend or relative, except under justifiable medical circumstances where that Person had a physician's prescription, e.g., buying Insulin for a diabetic child.]

[Comment to Article 2.6.2: Acceptable justification would include, for example, a team doctor carrying Prohibited Substances for dealing with acute and emergency situations.]

2.7 Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method

2.8 Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Method or any Prohibited Substance that is prohibited Out-of-Competition

2.9 Complicity

Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, *Attempted* anti-doping rule violation or violation of Article 10.12.1 by another *Person*.

2.10 Prohibited Association

Association by an *Athlete* or other *Person* subject to the authority of an *Anti-Doping Organization* in a professional or sport-related capacity with any *Athlete Support Person* who:

2.10.1 If subject to the authority of an *Anti-Doping Organization*, is serving a period of *Ineligibility*; or

2.10.2 If not subject to the authority of an *Anti-Doping Organization* and where *Ineligibility* has not been addressed in a results management process pursuant to the *Code*, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if *Code*-compliant rules had been applicable to such *Person*. The disqualifying status of such *Person* shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed; or

2.10.3 Is serving as a front or intermediary for an individual described in Article 2.10.1 or 2.10.2.

In order for this provision to apply, it is necessary that the *Athlete* or other *Person* has previously been advised in writing by an *Anti-Doping Organization* with jurisdiction over the *Athlete* or other *Person*, or by *WADA*, of the *Athlete Support Person's* disqualifying status and the potential *Consequence* of prohibited association and that the *Athlete* or other *Person* can reasonably avoid the association. The *Anti-Doping Organization* shall also use reasonable efforts to advise the *Athlete Support Person* who is the subject of the notice to the *Athlete* or other *Person* that the *Athlete Support Person* may, within 15 days, come forward to the *Anti-Doping Organization* to explain that the criteria described in Articles 2.10.1 and 2.10.2 do not apply to him or her. (Notwithstanding Article 17, this Article applies even when the *Athlete Support Person's* disqualifying conduct occurred prior to the effective date provided in Article 25.)

The burden shall be on the *Athlete* or other *Person* to establish that any association with *Athlete Support Personnel* described in Articles 2.10.1 or 2.10.2 is not in a professional or sport-related capacity.

Anti-Doping Organizations that are aware of *Athlete Support Personnel* who meet the criteria described in Articles 2.10.1, 2.10.2, or 2.10.3 shall submit that information to *WADA*.

[Comment to Article 2.10: Athletes and other Persons must not work with coaches, trainers, physicians or other Athlete Support Personnel who are Ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. Some examples of the types of association which are prohibited include: obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the Athlete Support Person to serve as an agent or representative. Prohibited association need not involve any form of compensation.]

ARTICLE 3: PROOF OF DOPING

3.1 Burdens and Standards of Proof

The *Anti-Doping Organization* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the *Anti-Doping Organization* has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the *Code* places the burden of proof upon the *Athlete* or other *Person*

alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

[Comment to Article 3.1: This standard of proof required to be met by the Anti-Doping Organization is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

[Comment to Article 3.2: For example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport.]

3.2.1 Analytical methods or decision limits approved by *WADA* after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any *Athlete* or other *Person* seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify *WADA* of the challenge and the basis of the challenge. *CAS* on its own initiative may also inform *WADA* of any such challenge. At *WADA's* request, the *CAS* panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of *WADA's* receipt of such notice, and *WADA's* receipt of the *CAS* file, *WADA* shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding.

3.2.2 *WADA*-accredited laboratories, and other laboratories approved by *WADA,* are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the International Standard for Laboratories. The *Athlete* or other *Person* may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*.

If the *Athlete* or other *Person* rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the *Adverse Analytical Finding*, then the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.

[Comment to Article 3.2.2: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person does so, the burden shifts to the Anti-Doping Organization to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.]

3.2.3 Departures from any other *International Standard* or other anti-doping rule or policy set forth in the *Code* or *Anti-Doping Organization* rules which did not cause an *Adverse Analytical Finding* or other anti-doping rule violation shall not invalidate such evidence or results. If the *Athlete* or other *Person* establishes a departure from another *International Standard* or other anti-doping rule or policy which could reasonably have caused an anti-doping rule violation based on an *Adverse Analytical Finding* or other anti-doping rule violation, then the *Anti-Doping Organization* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding* or the factual basis for the anti-doping rule violation.

3.2.4 The facts established by a decision of a court or professional disciplinary tribunal of competent jurisdiction which is not the subject of a pending appeal shall be irrebuttable evidence against the *Athlete* or other *Person* to whom the decision pertained of those facts unless the *Athlete* or other *Person* establishes that the decision violated principles of natural justice.

3.2.5 The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the *Athlete* or other *Person* who is asserted to have committed an anti-doping rule violation based on the *Athlete's* or other *Person's* refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or telephonically as directed by the hearing panel) and to answer questions from the hearing panel or the *Anti-Doping Organization* asserting the anti-doping rule violation.

ARTICLE 4: THE PROHIBITED LIST

4.2 Prohibited Substances and Prohibited Methods Identified on the Prohibited List

4.2.2 Specified Substances

For purposes of the application of Article 10, all *Prohibited Substances* shall be *Specified Substances* except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the *Prohibited List*. The category of *Specified Substances* shall not include *Prohibited Methods*.

[Comment to Article 4.2.2: The Specified Substances identified in Article 4.2.2

should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance.]

4.3 Criteria for Including Substances and Methods on the Prohibited List

4.3.3 *WADA*'s determination of the *Prohibited Substances* and *Prohibited Methods* that will be included on the *Prohibited List*, the classification of substances into categories on the *Prohibited List*, and the classification of the substance as prohibited at all times or *In-Competition* only, is final and shall not be subject to challenge by an *Athlete* or other *Person* based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport.

ARTICLE 6: ANALYSIS OF SAMPLES

Samples shall be analyzed in accordance with the following principles:

6.1 Use of Accredited and Approved Laboratories

For purposes of Article 2.1, *Samples* shall be analyzed only in *WADA*-accredited laboratories or laboratories otherwise approved by *WADA*. The choice of the *WADA*-accredited or *WADA*-approved laboratory used for the *Sample* analysis shall be determined exclusively by the *Anti-Doping Organization* responsible for results management.

[Comment to Article 6.1: For cost and geographic access reasons, WADA may approve laboratories which are not WADA-accredited to perform particular analysis-for example, analysis of blood which should be delivered from the collection site to the laboratory within a set deadline. Before approving any such laboratory, WADA will ensure it meets the high analytical and custodial standards required by WADA.

Violations of Article 2.1 may be established only by Sample analysis performed by a WADA-accredited laboratory or another laboratory approved by WADA. Violations of other Articles may be established using analytical results from other laboratories so long as the results are reliable.]

6.2 Purpose of Analysis of Samples

Samples shall be analyzed to detect *Prohibited Substances* and *Prohibited Methods* identified on the *Prohibited List* and other substances as may be directed by *WADA* pursuant to Article 4.5, or to assist an *Anti-Doping Organization* in profiling relevant parameters in an *Athlete's* urine, blood or other matrix, including DNA or genomic profiling, or for any other legitimate anti-doping purpose. *Samples* may be collected and stored for future analysis.

[Comment to Article 6.2: For example, relevant profile information could be used to direct Target Testing or to support an anti-doping rule violation proceeding under Article 2.2, or both.]

6.3 Research on Samples

No *Sample* may be used for research without the *Athlete's* written consent. *Samples* used for purposes other than Article 6.2 shall have any means of identification removed such that they cannot be traced back to a particular *Athlete*.

[Comment to Article 6.3: As is the case in most medical contexts, use of anonymized Samples for quality assurance, quality improvement, or to establish reference populations is not considered research.]

6.4 Standards for Sample Analysis and Reporting

Laboratories shall analyze *Samples* and report results in conformity with the International Standard for Laboratories. To ensure effective *Testing*, the Technical Document referenced at Article 5.4.1 will establish risk assessment-based *Sample* analysis menus appropriate for particular sports and sport disciplines, and laboratories shall analyze *Samples* in conformity with those menus, except as follows:

6.4.1 *Anti-Doping Organizations* may request that laboratories analyze their *Samples* using more extensive menus than those described in the Technical Document.

6.4.2 *Anti-Doping Organizations* may request that laboratories analyze their *Samples* using less extensive menus than those described in the Technical Document only if they have satisfied *WADA* that, because of the particular circumstances of their country or sport, as set out in their test distribution plan, less extensive analysis would be appropriate.

6.4.3 As provided in the International Standard for Laboratories, laboratories at their own initiative and expense may analyze *Samples* for *Prohibited Substances* or *Prohibited Methods* not included on the *Sample* analysis menu described in the Technical Document or specified by the *Testing* authority. Results from any such analysis shall be reported and have the same validity and consequence as any other analytical result.

[Comment to Article 6.4: The objective of this Article is to extend the principle of "intelligent Testing" to the Sample analysis menu so as to most effectively and efficiently detect doping. It is recognized that the resources available to fight doping are limited and that increasing the Sample analysis menu may, in some sports and countries, reduce the number of Samples which can be analyzed.]

6.5 Further Analysis of Samples

Any *Sample* may be subject to further analysis by the *Anti-Doping Organization* responsible for results management at any time before both the A and B *Sample* analytical results (or A *Sample* result where B *Sample* analysis has been waived or will not be performed) have been communicated by the *Anti-Doping Organization* to the *Athlete* as the asserted basis for an Article 2.1 anti-doping rule violation.

Samples may be stored and subjected to further analyses for the purpose of Article 6.2 at any time exclusively at the direction of the *Anti-Doping Organization* that initiated and directed *Sample* collection or *WADA*. (Any *Sample* storage or further analysis initiated by *WADA* shall be at *WADA's* expense.) Further analysis of *Samples* shall conform with the requirements of the International Standard for Laboratories and the International Standard for Testing and Investigations.

ARTICLE 7: RESULTS MANAGEMENT

7.11 Retirement from Sport

If an *Athlete* or other *Person* retires while a results management process is underway, the *Anti-Doping Organization* conducting the results management process retains jurisdiction to complete its results management process. If an *Athlete* or other *Person* retires before any results management process has begun, the *Anti-Doping Organization* which would have had results management authority over the *Athlete* or other *Person* at the time the *Athlete* or other *Person* committed an anti-doping rule violation, has authority to conduct results management.

[Comment to Article 7.11: Conduct by an Athlete or other Person before the Athlete or other Person was subject to the jurisdiction of any Anti-Doping Organization would not constitute an anti-doping rule violation but could be a legitimate basis for denying the Athlete or other Person membership in a sports organization.]

ARTICLE 8: RIGHT TO A FAIR HEARING AND NOTICE OF HEARING DECISION

8.4 Notice of Decisions

The reasoned hearing decision, or, in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the Anti-Doping Organization with results management responsibility to the Athlete and to other Anti-Doping Organizations with a right to appeal under Article 13.2.3 as provided in Article 14.2.1.

ARTICLE 9: AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

An anti-doping rule violation in *Individual Sports* in connection with an *In-Competition* test automatically leads to *Disqualification* of the result obtained in that *Competition* with all resulting *Consequences*, including forfeiture of any medals, points and prizes.

[Comment to Article 9: For Team Sports, any awards received by individual players will be Disqualified. However, Disqualification of the team will be as provided in Article 11. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation.]

ARTICLE 10: SANCTIONS ON INDIVIDUALS

10.1 Disqualification of Results in the Event During which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an *Event* may, upon the decision of the ruling body of the *Event*, lead to *Disqualification* of all of the *Athlete's* individual results obtained in that *Event* with all *Consequences*, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

Factors to be included in considering whether to *Disqualify* other results in an *Event* might include, for example, the severity of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Competitions*.

[Comment to Article 10.1: Whereas Article 9 Disqualifies the result in a single Competition in which the Athlete tested positive (e.g., the 100 meter backstroke), this Article may lead to Disqualification of all results in all races during the Event (e.g., the FINA World Championships).]

10.1.1 If the *Athlete* establishes that he or she bears *No Fault* or *Negligence* for the violation, the *Athlete's* individual results in the other *Competitions* shall not be *Disqualified* unless the *Athlete's* results in *Competitions* other than the *Competition* in which the anti-doping rule violation occurred were likely to have been affected by the *Athlete's* anti-doping rule violation.

10.2 Ineligibility for Presence Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method

The period of *Ineligibility* imposed for a first violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a

significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not intentional if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered intentional if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

10.3 Ineligibility for Other Anti-Doping Rule Violations

The period of *Ineligibility* for anti-doping rule violations other than as provided in Article 10.2 shall be as follows, unless Articles 10.5 or 10.6 are applicable:

10.3.1 For violations of Article 2.3 or Article 2.5, the *Ineligibility* period shall be four years unless, in the case of failing to submit to *Sample* collection, the *Athlete* can establish that the commission of the anti-doping rule violation was not intentional (as defined in Article 10.2.3), in which case the period of *Ineligibility* shall be two years.

10.3.2 For violations of Article 2.4, the period of *Ineligibility* shall be two years, subject to reduction down to a minimum of one year, depending on the *Athlete's* degree of *Fault*. The flexibility between two years and one year of *Ineligibility* in this Article is not available to *Athletes* where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the *Athlete* was trying to avoid being available for *Testing*.

10.3.3 For violations of Articles 2.7 or 2.8, the period of *Ineligibility* imposed shall be a minimum of four years up to lifetime *Ineligibility*, depending on the severity of the violation. An Article 2.7 or 2.8 violation involving a *Minor* shall be considered a particularly serious violation and, if committed by *Athlete Support Personnel* for violations other than for *Specified Substances*, shall result in lifetime *Ineligibility* for *Athlete Support Personnel*. In addition, significant violations of Articles 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.

[Comment to Article 10.3.3: Those who are involved in doping Athletes or covering up doping should be subject to sanctions which are more severe than the Athletes who test positive. Since the authority of sport organizations is generally limited to Ineligibility for accreditation, membership and other sport benefits, reporting Athlete Support Personnel to competent authorities is an important step in the deterrence of doping.]

10.3.4 For violations of Article 2.9, the period of *Ineligibility* imposed shall be a minimum of two years, up to four years, depending on the seriousness of the violation.

10.3.5 For violations of Article 2.10, the sanction shall be two years, subject to reduction down to a minimum of one year, depending on the *Athlete* or other *Person's* degree of *Fault* and other circumstances of the case.

[Comment to Article 10.3.5: Where the "other Person" referenced in Article 2.10 is an entity and not an individual, that entity may be disciplined as provided in Article 12.]

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault* or *Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

[Comment to Article 10.4: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.]

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of *Sanctions* for *Specified Substances* or *Contaminated Products* for Violations of Articles 2.1, 2.2 or 2.6.

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance,* and the *Athlete* or other *Person* can establish *No Significant Fault* or *Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish *No Significant Fault* or *Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

[Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form.]

10.5.2 Application of *No Significant Fault* or *Negligence* beyond the Application of Article 10.5.1.

If an *Athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault* or *Negligence*, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

[Comment to Article 10.5.2: Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Articles 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.]

10.6 Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault

10.6.1 *Substantial Assistance* in Discovering or Establishing Anti-Doping Rule Violations.

[Comment to Article 10.6.1: The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport. This is the only circumstance under the Code where the suspension of an otherwise applicable period of Ineligibility is authorized.]

10.6.1.1 An *Anti-Doping Organization* with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of *Ineligibility* imposed in an individual case where the *Athlete* or other *Person* has provided *Substantial Assistance* to an *Anti-Doping Organization*, criminal authority or professional disciplinary body which results in: (i) the *Anti-Doping Organization* discovering or bringing forward an anti-doping rule violation by another *Person*, or (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another *Person* and the information provided by the *Person* providing *Substantial Assistance* is made available to the *Anti-Doping Organization* with results management responsibility. After a final appellate decision under Article 13 or the expiration of time to appeal, an *Anti-Doping Organization* may only suspend a part of the otherwise applicable period of *Ineligibility* with the approval of *WADA* and the applicable International Federation. The extent to which the otherwise applicable period of *Ineligibility* may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the *Athlete* or other *Person* and the significance of the *Substantial Assistance* provided by the *Athlete* or other *Person* to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of *Ineligibility* may be suspended. If the otherwise applicable period of *Ineligibility* is a lifetime, the non-suspended period under this section must be no less than eight years. If the *Athlete* or other *Person* fails to continue to cooperate and to provide the complete and credible *Substantial Assistance* upon which a suspension of the period of *Ineligibility* was based, the *Anti-Doping Organization* that suspended the period of *Ineligibility* shall reinstate the original period of *Ineligibility*. If an *Anti-Doping Organization* decides to reinstate a suspended period of *Ineligibility* or decides not to reinstate a suspended period of *Ineligibility*, that decision may be appealed by any *Person* entitled to appeal under Article 13.

10.6.1.2 To further encourage *Athletes* and other *Persons* to provide *Substantial Assistance* to *Anti-Doping Organizations*, at the request of the *Anti-Doping Organization* conducting results management or at the request of the *Athlete* or other *Person* who has, or has been asserted to have, committed an anti-doping rule violation, *WADA* may agree at any stage of the results management process, including after a final appellate decision under Article 13, to what it considers to be an appropriate suspension of the otherwise-applicable period of *Ineligibility* and other *Consequences*. In exceptional circumstances, *WADA* may agree to suspensions of the period of *Ineligibility* and other *Consequences* for *Substantial Assistance* greater than those otherwise provided in this Article, or even no period of *Ineligibility*, and/or no return of prize money or payment of fines or costs. *WADA's* approval shall be subject to reinstatement of sanction, as otherwise provided in this Article. Notwithstanding Article 13, *WADA's* decisions in the context of this Article may not be appealed by any other *Anti-Doping Organization*.

10.6.1.3 If an *Anti-Doping Organization* suspends any part of an otherwise applicable sanction because of *Substantial Assistanc*e, then notice providing justification for the decision shall be provided to the other *Anti-Doping Organizations* with a right to appeal under Article 13.2.3 as provided in Article 14.2. In unique circumstances where *WADA* determines that it would be in the best interest of anti-doping, *WADA* may authorize an *Anti-Doping Organization* to enter into appropriate confidentiality agreements limiting or delaying the disclosure of the *Substantial Assistance* agreement or the nature of *Substantial Assistance* being provided.

10.6.2 Admission of an Anti-Doping Rule Violation in the Absence of Other Evidence.

Where an *Athlete* or other *Person* voluntarily admits the commission of an anti-doping rule violation before having received notice of a *Sample* collection which could establish an anti-doping rule violation (or, in the case of an anti-doping rule violation other than Article 2.1, before receiving first notice of the admitted violation pursuant to Article 7) and that admission is the only reliable evidence of the violation at the time of admission, then the period of *Ineligibility* may be reduced, but not below one-half of the period of *Ineligibility* otherwise applicable.

[Comment to Article 10.6.2: This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person believes he or she is about to be caught. The amount by which Ineligibility is reduced should be based on the likelihood that the Athlete or other Person would have been caught had he/she not come forward voluntarily.]

10.6.3 Prompt admission of an anti-doping rule violation after being confronted with a violation sanctionable under Article 10.2.1 or 10.3.1.

An *Athlete* or other *Person* potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing *Sample Collection* or *Tampering* with *Sample Collection*), by promptly admitting the asserted anti-doping rule violation after being confronted by an *Anti-Doping Organization*, and also upon the approval and at the discretion of both *WADA* and the *Anti-Doping Organization* with results management responsibility, may receive a reduction in the period of *Ineligibility* down to a minimum of two years, depending on the severity of the violation and the *Athlete* or other *Person's* degree of *Fault*.

10.6.4 Application of multiple grounds for reduction of a sanction.

Where an *Athlete* or other *Person* establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or suspension under Article 10.6, the otherwise applicable period of *Ineligibility* shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. If the *Athlete* or other *Person* establishes entitlement to a reduction or suspension of the period of *Ineligibility* under Article 10.6, then the period of *Ineligibility* may be reduced or suspended, but not below one-fourth of the otherwise applicable period of *Ineligibility*.

[Comment to Article 10.6.4: The appropriate sanction is determined in a sequence of four steps. First, the hearing panel determines which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) applies to the particular anti-doping rule violation. Second, if the basic sanction provides for a range of sanction, the hearing panel must determine the applicable sanction within that range according to the Athlete or other Person's degree of Fault. In a third step, the hearing panel establishes whether there is a basis for elimination, suspension, or reduction of the sanction (Article 10.6). Finally, the hearing panel decides on the commencement of the period of Ineligibility under Article 10.11.

Several examples of how Article 10 is to be applied are found in Appendix 2.]

10.7 Multiple Violations

10.7.1 For an *Athlete* or other *Person's* second anti-doping rule violation, the period of *Ineligibility* shall be the greater of:

(a) six months;

(b) one-half of the period of *Ineligibility* imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or

(c) two times the period of *Ineligibility* otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6.

The period of *Ineligibility* established above may then be further reduced by the application of Article 10.6.

10.7.2 A third anti-doping rule violation will always result in a lifetime period of *Ineligibility*, except if the third violation fulfills the condition for elimination or reduction of the period of *Ineligibility* under Article 10.4 or 10.5, or involves a violation of Article 2.4. In these particular cases, the period of *Ineligibility* shall be from eight years to lifetime *Ineligibility*.

10.7.3 An anti-doping rule violation for which an *Athlete* or other *Person* has established *No Fault* or *Negligence* shall not be considered a violation for purposes of this Article.

10.7.4 Additional Rules for Certain Potential Multiple Violations.

10.7.4.1 For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the *Anti-Doping Organization* can establish

that the *Athlete* or other *Person* committed the second anti-doping rule violation after the *Athlete* or other *Person* received notice pursuant to Article 7, or after the *Anti-Doping Organization* made reasonable efforts to give notice, of the first anti-doping rule violation; if the *Anti-Doping Organization* cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction.

10.7.4.2 If, after the imposition of a sanction for a first anti-doping rule violation, an *Anti-Doping Organization* discovers facts involving an anti-doping rule violation by the *Athlete* or other *Person* which occurred prior to notification regarding the first violation, then the *Anti-Doping Organization* shall impose an additional sanction based on the sanction that could have been imposed if the two violations would have been adjudicated at the same time. Results in all *Competitions* dating back to the earlier anti-doping rule violation will be *Disqualified* as provided in Article 10.8.

10.7.5 Multiple Anti-Doping Rule Violations During Ten-Year Period.

For purposes of Article 10.7, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations.

10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* under Article 9, all other competitive results of the *Athlete* obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other anti-doping rule violation occurred, through the commencement of any *Provisional Suspension* or *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified* with all of the resulting *Consequences* including forfeiture of any medals, points and prizes.

[Comment to Article 10.8: Nothing in the Code precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person.]

10.9 Allocation of CAS Cost Awards and Forfeited Prize Money

The priority for repayment of *CAS* cost awards and forfeited prize money shall be: first, payment of costs awarded by *CAS*; second, reallocation of forfeited prize money to other *Athletes* if provided for in the rules of the applicable International Federation; and third, reimbursement of the expenses of the *Anti-Doping Organization* that conducted results management in the case.

10.10 Financial Consequences

Anti-Doping Organizations may, in their own rules, provide for appropriate recovery of costs on account of anti-doping rule violations. However, *Anti-Doping Organizations* may only impose financial sanctions in cases where the maximum period of *Ineligibility* otherwise applicable has already been imposed. Recovery of costs or financial sanctions may only be imposed where the principle of proportionality is satisfied. No recovery of costs or financial sanction may be considered a basis for reducing the *Ineligibility* or other sanction which would otherwise be applicable under the *Code*.

10.11 Commencement of Ineligibility Period

Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived or there is no hearing, on the date *Ineligibility* is accepted or otherwise imposed.

[Comment to Article 10.11: Article 10.11 makes clear that delays not attributable to the Athlete, timely admission by the Athlete and Provisional Suspension are the only justifications for starting the period of Ineligibility earlier than the date of the final hearing decision.]

10.11.1 Delays Not Attributable to the *Athlete* or other *Person*.

Where there have been substantial delays in the hearing process or other aspects of not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

[Comment to Article 10.11.1: In cases of anti-doping rule violations other than under Article 2.1, the time required for an Anti-Doping Organization to discover and develop facts sufficient to establish an anti-doping rule violation may be lengthy, particularly where the Athlete or other Person has taken affirmative action to avoid detection. In these circumstances, the flexibility provided in this Article to start the sanction at an earlier date should not be used.]

10.11.2 Timely Admission

Where the *Athlete* or other *Person* promptly (which, in all events, for an *Athlete* means before the *Athlete* competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the *Anti-Doping Organization*, the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. In each case, however,

where this Article is applied, the *Athlete* or other *Person* shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* or other *Person* accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Article shall not apply where the period of *Ineligibility* already has been reduced under Article 10.6.3.

10.11.3 Credit for Provisional Suspension or Period of Ineligibility Served

10.11.3.1 If a *Provisional Suspension* is imposed and respected by the *Athlete* or other *Person*, then the *Athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. If a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *Athlete* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

10.11.3.2 If an *Athlete* or other *Person* voluntarily accepts a *Provisional Suspension* in writing from an *Anti-Doping Organization* with results management authority and thereafter respects the *Provisional Suspension*, the *Athlete* or other *Person* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete* or other *Person's* voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under Article 14.1.

[Comment to Article 10.11.3.2: An Athlete's voluntary acceptance of Provisional Suspension is not an admission by the Athlete and shall not be used in any way to draw an adverse inference against the Athlete.]

10.11.3.3 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the athlete elected not to compete or was suspended by his or her team.

10.11.3.4 In Team Sports, where a period of Ineligibility is imposed upon a team, unless fairness requires otherwise, the period of Ineligibility shall start on the date of the of the final hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed. Any period of team *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* to be served.

10.12 Status During Ineligibility

10.12.1 Prohibition Against Participation During *Ineligibility*

No *Athlete* or other *Person* who has been declared *Ineligible* may, during the period of *Ineligibility*, participate in any capacity in a *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory*, *Signatory's* member organization, or a club or other member organization of a *Signatory's* member organization, or in *Competitions* authorized or organized by any professional league or any international- or national-level *Event* organization or any elite or national-level sporting activity funded by a governmental agency.

An *Athlete* or other *Person* subject to a period of *Ineligibility* longer than four years may, after completing four years of the period of *Ineligibility*, participate as an *Athlete* in local sport events not sanctioned or otherwise under the jurisdiction of a *Code Signatory* or member of a *Code Signatory*, but only so long as the local sport event is not at a level that could otherwise qualify such *Athlete* or other *Person* directly or indirectly to compete in (or accumulate points toward) a national championship or *International Event*, and does not involve the *Athlete* or other *Person* working in any capacity with *Minors*.

An *Athlete* or other *Person* subject to a period of *Ineligibility* shall remain subject to *Testing*.

[Comment to Article 10.12.1: For example, subject to Article 10.12.2 below, an Ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in Article 10.12.3. The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Mutual Recognition).]

10.12.2 Return for Training

As an exception to Article 10.12.1, an *Athlete* may return to train with a team or to use the facilities of a club or other member organization of a *Signatory's* member organization during the shorter of: (1) the last two months of the *Athlete's* period of *Ineligibility*, or (2) the last one-quarter of the period of *Ineligibility* imposed.

[Comment to Article 10.12.2: In many Team Sports and some individual sports (e.g., ski jumping and gymnastics), an Athlete cannot effectively train on his/her own so as to be ready to compete at the end of the Athlete's period of Ineligibility.

During the training period described in this Article, an Ineligible Athlete may not compete or engage in any activity described in Article 10.12.1 other than training.]

10.12.3 Violation of the Prohibition of Participation During *Ineligibility*

Where an *Athlete* or other *Person* who has been declared *Ineligible* violates the prohibition against participation during *Ineligibility* described in Article 10.12.1, the results of such participation shall be *Disqualified* and a new period of *Ineligibility* equal in length up to the original period of *Ineligibility* shall be added to the end of the original period of *Ineligibility*. The new period of *Ineligibility* may be adjusted based on the *Athlete* or other *Person's* degree of *Fault* and other circumstances of the case. The determination of whether an *Athlete* or other *Person* has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the *Anti-Doping Organization* whose results management led to the imposition of the initial period of *Ineligibility*. This decision may be appealed under Article 13.

Where an *Athlete Support Person* or other *Person* assists a *Person* in violating the prohibition against participation during *Ineligibility*, an *Anti-Doping Organization* with jurisdiction over such *Athlete Support Person* or other *Person* shall impose sanctions for a violation of Article 2.9 for such assistance.

10.12.4 Withholding of Financial Support during *Ineligibility*

In addition, for any anti-doping rule violation not involving a reduced sanction as described in Article 10.4 or 10.5, some or all sport-related financial support or other sport-related benefits received by such *Person* will be withheld by *Signatories*, *Signatories'* member organizations and governments.

10.13 Automatic Publication of Sanction

A mandatory part of each sanction shall include automatic publication, as provided in Article 14.3.

[Comment to Article 10: Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short, a standard period of Ineligibility has a much more significant effect on the Athlete than in sports where careers are traditionally much longer. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.]

ARTICLE 11: CONSEQUENCES TO TEAMS

11.1 Testing of Team Sports

Where more than one member of a team in a *Team Sport* has been notified of an anti-doping rule violation under Article 7 in connection with an *Event*, the ruling body for the *Event* shall conduct appropriate *Target Testing* of the team during the *Event Period*.

11.2 Consequences for Team Sports

If more than two members of a team in a *Team Sport* are found to have committed an anti-doping rule violation during an *Event Period*, the ruling body of the *Event* shall impose an appropriate sanction on the team (e.g., loss of points, *Disqualification* from a *Competition* or *Event*, or other sanction) in addition to any *Consequences* imposed upon the individual *Athletes* committing the anti-doping rule violation.

11.3 Event Ruling Body May Establish Stricter Consequences for Team Sports

The ruling body for an *Event* may elect to establish rules for the *Event* which impose *Consequences* for *Team Sports* stricter than those in Article 11.2 for purposes of the Event.

[Comment to Article 11.3: For example, the International Olympic Committee could establish rules which would require Disqualification of a team from the Olympic Games based on a lesser number of anti-doping rule violations during the period of the Games.]

ARTICLE 13: APPEALS

13.1 Decisions Subject to Appeal

Decisions made under the *Code* or rules adopted pursuant to the *Code* may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in the *Code* or *International Standards*. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review provided in the *Anti-Doping Organization's* rules must be exhausted, provided that such review respects the principles set forth in Article 13.2.2 below (except as provided in Article 13.1.3).

13.1.1 Scope of Review Not Limited

The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker.

13.1.2 *CAS* Shall Not Defer to the Findings Being Appealed

In making its decision, *CAS* need not give deference to the discretion exercised by the body whose decision is being appealed.

[Comment to Article 13.1.2: CAS proceedings are de novo. Prior proceedings do not limit the evidence or carry weight in the hearing before CAS.]

13.1.3 *WADA* Not Required to Exhaust Internal Remedies

Where *WADA* has a right to appeal under Article 13 and no other party has appealed a final decision within the *Anti-Doping Organization's* process, *WADA* may appeal such decision directly to *CAS* without having to exhaust other remedies in the *Anti-Doping Organization* process.

[Comment to Article 13.1.3: Where a decision has been rendered before the final stage of an Anti-Doping Organization's process (for example, a first hearing) and no party elects to appeal that decision to the next level of the Anti-Doping Organization's process (e.g., the Managing Board), then WADA may bypass the remaining steps in the Anti-Doping Organization's internal process and appeal directly to CAS.]

13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction

A decision that an anti-doping rule violation was committed, a decision imposing *Consequences* or not imposing *Consequences* for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision by *WADA* not to grant an exception to the six months notice requirement for a retired *Athlete* to return to *Competition* under Article 5.7.1; a decision by *WADA* assigning results management under Article 7.1; a decision by an *Anti-Doping Organization* not to bring forward an *Adverse Analytical Finding* or an *Atypical Finding* as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation under Article 7.7; a decision to impose a *Provisional Suspension* as a result of a *Provisional Hearing* or for an *Anti-Doping Organization's* failure to comply with Article 7.9; a decision that an *Anti-Doping Organization* lacks jurisdiction to rule on an alleged anti-doping rule violation or its *Consequences*; a decision to suspend, or not suspend, a period of *Ineligibility* or to reinstate, or not reinstate, a suspended period of *Ineligibility* under Article 10.6.1; a decision under Article 10.12.3; and a decision by an *Anti-Doping Organization* not to recognize another *Anti-Doping Organization's* decision under Article 15 may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving *International-Level Athletes* or *International Events*

In cases arising from participation in an *International Event* or in cases involving *International-Level Athletes*, the decision may be appealed exclusively to *CAS* in accordance with the provisions applicable before such court.

[Comment to Article 13.2.1: CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards.]

13.2.2 *[Omitted.]*

13.2.3 *Persons* Entitled to Appeal

In cases under Article 13.2.1, the following parties shall have the right to appeal to *CAS:* (a) the *Athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the *National Anti-Doping Organization* of the *Person's* country of residence or countries where the *Person* is a national or license holder; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including Games; and (f) *WADA*.

In cases under Article 13.2.2, the parties having the right to appeal to the national-level appeal body shall be as provided in the *National Anti-Doping Organization's* rules but, at a minimum, shall include the following parties*:* (a) the *Athlete* or other *Person* who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation; (d) the *National Anti-Doping Organization* of the *Person's* country of residence; (e) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games, and (f) *WADA*. For cases under Article 13.2.2, *WADA*, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federation shall also have the right to appeal to *CAS* with respect to the decision of the national-level appeal body. Any party filing an appeal shall be entitled to assistance from *CAS* to obtain all relevant information from the *Anti-Doping Organization* whose decision is being appealed and the information shall be provided if *CAS* so directs.

The filing deadline for an appeal filed by *WADA* shall be the later of*:*

(a) Twenty-one days after the last day on which any other party in the case could have appealed, or

(b) Twenty-one days after *WADA's* receipt of the complete file relating to the decision.

Notwithstanding any other provision herein, the only *Person* who may appeal from a *Provisional Suspension* is the *Athlete* or other *Person* upon whom the *Provisional Suspension* is imposed.

13.2.4 Cross Appeals and other Subsequent Appeals Allowed

Cross appeals and other subsequent appeals by any respondent named in cases brought to *CAS* under the *Code* are specifically permitted. Any party with a right to appeal under this Article 13 must file a cross appeal or subsequent appeal with the party's answer.

[Comment to Article 13.2.4: This provision is necessary because since 2011, CAS rules no longer permit an Athlete the right to cross appeal when an Anti-Doping Organization appeals a decision after the Athlete's time for appeal has expired. This provision permits a full hearing for all parties.]

13.3 Failure to Render a Timely Decision by an Anti-Doping Organization

Where, in a particular case, an *Anti-Doping Organization* fails to render a decision with respect to whether an anti-doping rule violation was committed within a reasonable deadline set by *WADA*, *WADA* may elect to appeal directly to *CAS* as if the *Anti-Doping Organization* had rendered a decision finding no anti-doping rule violation. If the *CAS* hearing panel determines that an anti-doping rule violation was committed and that *WADA* acted reasonably in electing to appeal directly to *CAS*, then *WADA's* costs and attorneys fees in prosecuting the appeal shall be reimbursed to *WADA* by the *Anti-Doping Organization*.

[Comment to Article 13.3: Given the different circumstances of each anti-doping rule violation investigation and results management process, it is not feasible to establish a fixed time period for an Anti-Doping Organization to render a decision before WADA may intervene by appealing directly to CAS. Before taking such action, however, WADA will consult with the Anti-Doping Organization and give the Anti-Doping Organization an opportunity to explain why it has not yet rendered a decision. Nothing in this Article prohibits an International Federation from also having rules which authorize it to assume jurisdiction for matters in which the results management performed by one of its National Federations has been inappropriately delayed.]

13.4 Appeals Relating to TUEs

TUE decisions may be appealed exclusively as provided in Article 4.4.

13.5 Notification of Appeal Decisions

Any *Anti-Doping Organization* that is a party to an appeal shall promptly provide the appeal decision to the *Athlete* or other *Person* and to the other *Anti-Doping Organizations* that would have been entitled to appeal under Article 13.2.3 as provided under Article 14.2.

[Comment to Article 13: The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal. Anti-doping decisions by Anti-Doping Organizations are made transparent in Article 14. Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions. Note that the definition of interested Persons and organizations with a right to appeal under Article 13 does not include Athletes, or their federations, who might benefit from having another competitor disqualified.]

ARTICLE 15: APPLICATION AND RECOGNITION OF DECISIONS

15.1 Subject to the right to appeal provided in Article 13, *Testing*, hearing results or other final adjudications of any *Signatory* which are consistent with the *Code* and are within that *Signatory's* authority, shall be applicable worldwide and shall be recognized and respected by all other *Signatories*.

[Comment to Article 15.1: The extent of recognition of TUE decisions of other Anti-Doping Organizations shall be determined by Article 4.4 and the International Standard for Therapeutic Use Exemptions.]

ARTICLE 17: STATUTE OF LIMITATIONS

No anti-doping rule violation proceeding may be commenced against an *Athlete* or other *Person* unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, within ten years from the date the violation is asserted to have occurred.

ARTICLE 24: INTERPRETATION OF THE CODE

24.1 The official text of the *Code* shall be maintained by *WADA* and shall be published in English and French. In the event of any conflict between the English and French versions, the English version shall prevail.

24.2 The comments annotating various provisions of the *Code* shall be used to interpret the *Code*.

24.3 The *Code* shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the *Signatories* or governments.

24.4 The headings used for the various Parts and Articles of the *Code* are for convenience only and shall not be deemed part of the substance of the *Code* or to affect in any way the language of the provisions to which they refer.

24.5 The *Code* shall not apply retroactively to matters pending before the date the *Code* is accepted by a *Signatory* and implemented in its rules. However, pre-*Code* anti-doping rule violations would continue to count as "First violations" or "Second violations" for purposes of determining sanctions under Article 10 for subsequent post-*Code* violations.

24.6 The Purpose, Scope and Organization of the World Anti-Doping Program and the *Code* and Appendix 1, Definitions and Appendix 2, Examples of the Application of Article 10, shall be considered integral parts of the *Code*.

ARTICLE 25: TRANSITIONAL PROVISIONS

25.1 General Application of the 2015 Code

The 2015 *Code* shall apply in full as of 1 January 2015 (the "Effective Date").

25.2 Non-Retroactive except for Articles 10.7.5 and 17 or Unless Principle of "Lex Mitior" Applies

The retrospective period in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall only be applied retroactively if the statute of limitation period has not already expired by the Effective Date. Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case.

25.3 Application to Decisions Rendered Prior to the 2015 Code

With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to the Effective Date, but the *Athlete* or other *Person* is still serving the period of Ineligibility as of the Effective Date, the Athlete or other Person may apply to the Anti-Doping Organization which had results management responsibility for the anti-doping rule violation to consider a reduction in the period of Ineligibility in light of the 2015 *Code*. Such application must be made before the period of *Ineligibility* has expired. The decision rendered by the *Anti-Doping Organization* may be appealed pursuant to Article 13.2. The 2015 *Code* shall have no application to any anti-doping rule violation case where a final decision finding an anti-doping rule violation has been rendered and the period of Ineligibility has expired.

25.4 Multiple Violations Where the First Violation Occurs Prior to 1 January 2015.

For purposes of assessing the period of *Ineligibility* for a second violation under Article 10.7.1, where the sanction for the first violation was determined based on pre-2015 *Code* rules, the period of *Ineligibility* which would have been assessed for that first violation had 2015 *Code* rules been applicable, shall be applied.

[Comment to Article 25.4: Other than the situation described in Article 25.4, where a final decision finding an anti-doping rule violation has been rendered prior to the existence of the Code or under the Code in force before the 2015 Code and the period of Ineligibility imposed has been completely served, the 2015 Code may not be used to re-characterize the prior violation.]

25.5 Additional Code Amendments

Any additional *Code* Amendments shall go into effect as provided in Article 23.7.

APPENDIX 1: DEFINITIONS

ADAMS: The Anti-Doping Administration and Management System is a Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and *WADA* in their anti-doping operations in conjunction with data protection legislation.

Administration: Providing, supplying, supervising, facilitating, or otherwise participating in the *Use* or *Attempted Use* by another *Person* of a *Prohibited Substance* or *Prohibited Method*. However, this definition shall not include the actions of bona fide medical personnel involving a *Prohibited Substance* or *Prohibited Method* used for genuine and legal therapeutic purposes or other acceptable justification and shall not include actions involving *Prohibited Substance*s which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate that such *Prohibited Substance*s are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

Adverse Analytical Finding: A report from a *WADA*-accredited laboratory or other *WADA*-approved entity that, consistent with the International Standard for Laboratories and related Technical Documents, identifies in a *Sample* the presence of a *Prohibited Substance* or its *Metabolites* or *Markers* (including elevated quantities of endogenous substances) or evidence of the Use of a *Prohibited Method*.

Adverse Passport Finding: A report resulting from the process set forth in the applicable Technical Document or Guideline which concludes that the analytical results reviewed are inconsistent with a normal physiological condition or known pathology and compatible with the *Use* of a *Prohibited Substance* or *Prohibited Method*.

Anti-Doping Organization: A *Signatory* that is responsible for adopting rules for initiating, implementing or enforcing any part of the *Doping Control* process. This includes, for example, the International Olympic Committee, the International Paralympic Committee, other *Major Event Organizations* that conduct *Testing* at their *Events*, *WADA*, International Federations, and *National Anti-Doping Organizations*.

Athlete: Any *Person* who competes in sport at the international level (as defined by each International Federation), or the national level (as defined by each *National Anti-Doping Organization*). An *Anti-Doping Organization* has discretion to apply anti-doping rules to an *Athlete* who is neither an *International-Level Athlete* nor a *National-Level Athlete*, and thus to bring them within the definition of "*Athlete*." In relation to *Athlete*s who are neither International-Level nor *National-Level Athlete*s, an *Anti-Doping Organization* may elect to: conduct limited *Testing* or no *Testing* at all; analyze *Samples* for less than the full menu of *Prohibited Substance*s; require limited or no whereabouts information; or not require advance *TUEs*. However, if an Article 2.1 or Article 2.5 anti-doping rule violation is committed by any *Athlete* over whom an *Anti-Doping Organization* has authority who competes below the international or national level, then the *Consequence*s set forth in the *Code* (except Article 14.3.2) must be applied.

For purposes of Article 2.8 and Article 2.9 and for purposes of anti-doping information and education, any *Person* who competes in sport under the authority of any *Signatory*, government, or other sports organization accepting the *Code* is an *Athlete*.

[Comment: This definition makes it clear that all International- and National-Level Athletes are subject to the anti-doping rules of the Code, with the precise definitions of international- and national-level sport to be set forth in the anti-doping rules of the International Federations and National Anti-Doping Organizations, respectively. The definition also allows each National Anti-Doping Organization, if it chooses to do so, to expand its anti-doping program beyond International- or National-Level Athletes to competitors at lower levels of Competition or to individuals who engage in fitness activities but do not compete at all. Thus, a National Anti-Doping Organization could, for example, elect to test recreational-level competitors but not require advance TUEs. But an anti-doping rule violation involving an Adverse Analytical Finding or Tampering, results in all of the Consequences provided for in the Code (with the exception of Article 14.3.2). The decision on whether Consequences apply to recreational-level Athletes who engage in fitness activities but never compete is left to the National Anti-Doping Organization. In the same manner, a Major Event Organization holding an Event only for masters-level competitors could elect to test the competitors but not analyze Samples for the full menu of Prohibited Substances. Competitors at all levels of Competition should receive the benefit of anti-doping information and education.]

Athlete Biological Passport: The program and methods of gathering and collating data as described in the International Standard for Testing and Investigations and International Standard for Laboratories.

Athlete Support Personnel: Any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other *Person* working with, treating or assisting an *Athlete* participating in or preparing for sports *Competition*.

Attempt: Purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an *Attempt* to commit a violation if the *Person* renounces the *Attempt* prior to it being discovered by a third party not involved in the *Attempt*.

Atypical Finding: A report from a *WADA*-accredited laboratory or other *WADA*-approved laboratory which requires further investigation as provided by the International Standard for Laboratories or related Technical Documents prior to the determination of an *Adverse Analytical Finding*.

CAS: The Court of Arbitration for Sport.

Code: The World Anti-Doping *Code*.

Competition: A single race, match, game or singular sport contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletics. For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a *Competition* and an *Event* will be as provided in the rules of the applicable International Federation.

Consequences of Anti-Doping Rule Violations ("Consequences"): An *Athlete*'s or other *Person's* violation of an anti-doping rule may result in one or more of the following: (a) *Disqualification* means the *Athlete*'s results in a particular *Competition* or *Event* are invalidated, with all resulting *Consequences* including forfeiture of any medals, points and prizes; (b) *Ineligibility* means the *Athlete* or other *Person* is barred on account of an anti-doping rule violation for a specified period of time from participating in any *Competition* or other activity or funding as provided in Article 10.12.1; (c) *Provisional Suspension* means the *Athlete* or other *Person* is barred temporarily from participating in any *Competition* or activity prior to the final decision at a hearing conducted under Article 8; (d) Financial *Consequences* means a *CAS* cost award or a financial sanction imposed for an anti-doping rule violation or to recover costs associated with an anti-doping rule violation; and (e) *Public Disclosure* or *Reporting* means the disclosure of information related to anti-doping rule violations as provided in Article 14. Teams in *Team Sports* may also be subject to *Consequences* as provided in Article 11.

Contaminated Product: A product that contains a *Prohibited Substance* that is not disclosed on the product label or in information available in a reasonable Internet search.

Disqualification: See Consequences of Anti-Doping Rule Violations above.

Doping Control: All steps and processes from *Test Distribution Planning* through to ultimate disposition of any appeal including all steps and processes in between such as provision of whereabouts information, *Sample* collection and handling, laboratory analysis, *TUEs*, results management and hearings.

Event: A series of individual *Competitions* conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games).

Event Venues: Those venues so designated by the ruling body for the *Event*.

Event Period: The time between the beginning and end of an *Event*, as established by the ruling body of the *Event*.

Fault: *Fault* is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an *Athlete* or other *Person's* degree of *Fault* include, for example, the *Athlete*'s or other *Person's* experience, whether the *Athlete* or other *Person* is a *Minor*, special considerations such as disability, the degree of risk that should have been perceived by the *Athlete* and the level of care and investigation exercised by the *Athlete* in relation to what should have been the perceived level of risk. In assessing the *Athlete*'s or other *Person's* degree of *Fault*, the circumstances considered must be specific and relevant to explain the *Athlete*'s or other *Person's* departure from the expected standard of behavior. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of *Ineligibility*, or the fact that the *Athlete* only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of *Ineligibility* under Article 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

In-Competition: Unless provided otherwise in the rules of an International Federation or the ruling body of the *Event* in question, "*In-Competition*" means the period commencing twelve hours before a *Competition* in which the *Athlete* is scheduled to participate through the end of such *Competition* and the *Sample* collection process related to such *Competition*.

[Comment: An International Federation or ruling body for an Event may establish an "In-Competition" period that is different than the Event Period.]

Independent Observer Program: A team of observers, under the supervision of *WADA*, who observe and provide guidance on the *Doping Control* process at certain *Events* and report on their observations.

Individual Sport: Any sport that is not a *Team Sport*.

Ineligibility: See *Consequences of Anti-Doping Rule Violations* above.

International Event: An *Event* or *Competition* where the International Olympic Committee, the International Paralympic Committee, an International Federation, a Major Event Organization, or another international sport organization is the ruling body for the *Event* or appoints the technical officials for the *Event*.

International-Level Athlete: *Athlete*s who participate in sport at the international level, as defined by each International Federation, consistent with the International Standard for Testing and Investigations.

[Comment: Consistent with the International Standard for Testing and Investigations, the International Federation is free to determine the criteria it will use to classify Athletes as International-Level Athletes, e.g., by ranking, by participation in particular International Events, by type of license, etc. However, it must publish those criteria in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes. For example, if the criteria include participation in certain International Events, then the International Federation must publish a list of those International Events.]

International Standard: A standard adopted by *WADA* in support of the *Code*. Compliance with an *International Standard* (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the *International Standard* were performed properly. *International Standards* shall include any Technical Documents issued pursuant to the *International Standard*.

Major Event Organizations: The continental associations of *National Olympic Committees* and other international multi-sport organizations that function as the ruling body for any continental, regional or other *International Event*.

Marker: A compound, group of compounds or biological variable(s) that indicates the *Use* of a *Prohibited Substance* or *Prohibited Method*.

Metabolite: Any substance produced by a biotransformation process.

Minor: A natural *Person* who has not reached the age of eighteen years.

National Anti-Doping Organization: The entity(ies) designated by each country as possessing the primary authority and responsibility to adopt and implement anti-doping rules, direct the collection of *Sample*s, the management of test results, and the conduct of hearings at the national level. If this designation has not been made by the competent public authority(ies), the entity shall be the country's National Olympic Committee or its designee.

National Event: A sport *Event* or *Competition* involving *International-* or *National-Level Athlete*s that is not an *International Event*.

National-Level Athlete: *Athlete*s who participate in sport at the national level, as defined by each *National Anti-Doping Organization*, consistent with the International Standard for Testing and Investigations.

National Olympic Committee: The organization recognized by the International Olympic Committee. The term *National Olympic Committee* shall also include the National Sport Confederation in those countries where the National Sport Confederation assumes typical *National Olympic Committee* responsibilities in the anti-doping area.

No Fault or Negligence: The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

No Significant Fault or Negligence: The *Athlete* or other *Person's* establishing that his or her *Fault* or *Negligence*, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault* or *Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]

Out-of-Competition: Any period which is not *In-Competition*.

Participant: Any *Athlete* or *Athlete Support Person*.

Person: A natural *Person* or an organization or other entity.

Possession: The actual, physical *Possession*, or the constructive *Possession* (which shall be found only if the *Person* has exclusive control or intends to exercise control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists); provided, however, that if the *Person* does not have exclusive control over the *Prohibited Substance* or *Prohibited Method* or the premises in which a *Prohibited Substance* or *Prohibited Method* exists, constructive *Possession* shall only be found if the *Person* knew about the presence of the *Prohibited Substance* or *Prohibited Method* and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on *Possession* if, prior to receiving notification of any kind that the *Person* has committed an anti-doping rule violation, the *Person* has taken concrete action demonstrating that the *Person* never intended to have *Possession* and has renounced *Possession* by explicitly declaring it to an *Anti-Doping Organization*. Notwithstanding anything to the contrary in this definition, the purchase (including by any electronic or other means) of a *Prohibited Substance* or *Prohibited Method* constitutes *Possession* by the *Person* who makes the purchase.

[Comment: Under this definition, steroids found in an Athlete's car would constitute a violation unless the Athlete establishes that someone else used the car; in that event, the Anti-Doping Organization must establish that, even though the Athlete did not have exclusive control over the car, the Athlete knew about the steroids and intended to have control over the steroids. Similarly, in the example of steroids found in a home medicine cabinet under the joint control of an Athlete and spouse, the Anti-Doping Organization must establish that the Athlete knew the steroids were in the cabinet and that the Athlete intended to exercise control over the steroids. The act of purchasing a Prohibited Substance alone constitutes Possession, even where, for example, the product does not arrive, is received by someone else, or is sent to a third party address.]

Prohibited List: The List identifying the *Prohibited Substance*s and *Prohibited Method*s.

Prohibited Method: Any method so described on the *Prohibited List*.

Prohibited Substance: Any substance, or class of substances, so described on the Prohibited List.

Provisional Hearing: For purposes of Article 7.9, an expedited abbreviated hearing occurring prior to a hearing under Article 8 that provides the *Athlete* with notice and an opportunity to be heard in either written or oral form.

[Comment: A Provisional Hearing is only a preliminary proceeding which may not involve a full review of the facts of the case. Following a Provisional Hearing, the Athlete remains entitled to a subsequent full hearing on the merits of the case. By contrast, an "expedited hearing," as that term is used in Article 7.9, is a full hearing on the merits conducted on an expedited time schedule.]

Provisional Suspension: See *Consequences of Anti-Doping Rules Violations* above.

Publicly Disclose or Publicly Report: To disseminate or distribute information to the general public or *Persons* beyond those *Persons* entitled to earlier notification in accordance with Article 14.

Regional Anti-Doping Organization: A regional entity designated by member countries to coordinate and manage delegated areas of their national anti-doping programs, which may include the adoption and implementation of anti-doping rules, the planning and collection of *Samples*, the management of results, the review of *TUEs*, the conduct of hearings, and the conduct of educational programs at a regional level.

Registered Testing Pool: The pool of highest-priority *Athlete*s established separately at the international level by International Federations and at the national level by *National Anti-Doping Organizations*, who are subject to focused *In-Competition* and *Out-of-Competition Testing* as part of that International Federation's or *National Anti-Doping Organization's* test distribution plan and therefore are required to provide whereabouts information as provided in Article 5.6 and the International Standard for Testing and Investigations.

Sample or Specimen: Any biological material collected for the purposes of *Doping Control*.

[Comment: It has sometimes been claimed that the collection of blood Samples violates the tenets of certain religious or cultural groups. It has been determined that there is no basis for any such claim.]

Signatories: Those entities signing the *Code* and agreeing to comply with the *Code*, as provided in Article 23.

Specified Substance: See Article 4.2.2.

Strict Liability: The rule which provides that under Article 2.1 and Article 2.2, it is not necessary that intent, *Fault,* negligence, or knowing *Use* on the *Athlete*'s part be demonstrated by the *Anti-Doping Organization* in order to establish an anti-doping rule violation.

Substantial Assistance: For purposes of Article 10.6.1, a *Person* providing *Substantial Assistance* must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an *Anti-Doping Organization* or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought.

Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring.

Target Testing: Selection of specific *Athlete*s for *Testing* based on criteria set forth in the International Standard for Testing and Investigations.

***Team Sport*:** A sport in which the substitution of players is permitted during a *Competition*.

Testing: The parts of the *Doping Control* process involving test distribution planning, *Sample* collection, *Sample* handling, and *Sample* transport to the laboratory.

Trafficking: Selling, giving, transporting, sending, delivering or distributing (or *Possessing* for any such purpose) a *Prohibited Substance* or *Prohibited Method* (either physically or by any electronic or other means) by an *Athlete*, *Athlete Support Person* or any other *Person* subject to the jurisdiction of an *Anti-Doping Organization* to any third party; provided, however, this definition shall not include the actions of "bona fide" medical personnel involving a *Prohibited Substance* used for genuine and legal therapeutic purposes or other acceptable justification, and shall not include actions involving *Prohibited Substance*s which are not prohibited in *Out-of-Competition Testing* unless the circumstances as a whole demonstrate such *Prohibited Substance*s are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.

TUE: Therapeutic Use Exemption, as described in Article 4.4.

UNESCO Convention: The International Convention against Doping in Sport adopted by the 33rd session of the UNESCO General Conference on 19 October 2005, including any and all amendments adopted by the States Parties to the Convention and the Conference of Parties to the International Convention against Doping in Sport.

Use: The utilization, application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method*.

WADA: The World Anti-Doping Agency.

ANNEX B

A LABORATORY DOCUMENTATION PACKAGE

The following documents will accompany the initial notification to the Athlete or other Person of a positive A Sample analysis:

1. A standard notice setting forth the review procedures, *Athlete's* or other *Person's* rights, and contact information for the USOC Athlete Ombudsman (including name, telephone number, email address and website URL).
2. Notification of the *Prohibited Substance* at issue which could result in an anti-doping rule violation. In those cases where an administrative threshold concentration is employed, that threshold will be noted. When possible, the degree to which the *Athlete's* or other *Person's Sample* exceeds the threshold will be reported.
3. An abbreviated analytical report to the A *Sample* confirmation analysis. The abbreviated data should include applicable analytical confirmation technique (e.g., gas chromatography/mass spectrometric) graphical data for negative control urine, a positive control urine (including quantitative data where relevant), and the Athlete's or other *Person's Sample*. The purpose of this data is to allow the *Athlete* or other *Person* or their representative to determine a course of action. It is understood that due to time constraints involved, there is typically less time to review and organize this data prior to transmittal than with the documentation package to accompany the B *Sample* which will also address documents related to the A *Sample* analysis.
4. For Erythropoietin ("EPO") cases, provide the Basic Area Percentage ("BAP") of r-EPO, stated as a percentage term.
5. A cover page summarizing, in plain English, the following data contained in the laboratory documentation package: (i) the test collection date; (ii) the name of the substance reported positive or elevated; and (iii) quantification information as follows: (a) for substances where *WADA* has established a reporting threshold, an estimate of the concentration relative to the threshold; (b) for T/E ratios, the approximate screen concentrations of T and E [note that T/E ratios are reported based on a comparison of the relative signals of T and E not a comparison of absolute quantities of T and E]; (c) for non-threshold substances, a statement whether the concentration is relatively "high," "medium" or "low" with a reference range provided for the positive or elevated substance in question. Note that for non-threshold substances the presence of any quantity of the *Prohibited Substance* is an anti-doping rule violation.

ANNEX C
B LABORATORY DOCUMENTATION PACKAGE

The following documentation will be supplied as the standard documentation package:

- Table of contents
- List of laboratory staff involved in the test, including signatures and/or initials and position title(s)
- *Sample* identification information
- Organization requesting the test
- Date of *Sample* collection and site identification
- USADA *Sample* identification number
- Laboratory *Sample* identification number
- Urine integrity test results (if completed)
- *Chain of Custody* documentation for *Sample* container
- *Doping Control* form (laboratory copy)
- Transportation *Chain of Custody* (e.g., courier documentation, laboratory receipt of container)
- A *Sample* container *Chain(s) of Custody*
- Documentation of any deviations from the written screening procedures (if any)
- A *Sample* screening results
- Relevant aliquot *Chain(s) of Custody*
- Screening procedure data, including chromatograms (or other relevant data), for negative control urine
- Positive control urine (with concentration indicated, if relevant)
- *Sample* urine aliquot(s)
- Analytical run instrument validation data (e.g.; tune data)
- Documentation of any deviations from the written screening procedures (if any)
- A *Sample* confirmation results
- Summary of the analytical principles of the confirmation method
- Aliquot *Chain of Custody*
- Sequence verification data
- Confirmation procedure data, including chromatograms (or other relevant data), for
- Negative control urine

- Positive control urine (with concentration indicated, if relevant)
- Standard(s)/calibrator(s) (if relevant)
- *Sample* urine aliquot(s)
- Analytical run instrument validation data (e.g.; tune data)
- A *Sample* report (including numerical data for threshold substances*)
- pH, Specific Gravity, and other urine integrity test results (if applicable, including abnormal appearance of *Sample*)
- Documentation of any deviations from the written screening procedures (if any)
- B *Sample* confirmation results
- B *Sample* container *Chain(s) of Custody*
- Summary of the analytical principles of the confirmation method (if different than A *Sample*)
- Aliquot *Chain of Custody*
- Sequence verification data
- Confirmation procedure data, including chromatograms (or other relevant data), for negative control urine
- Positive control urine (with concentration indicated, if relevant)
- Standard(s)/calibrator(s) (if relevant)
- *Sample* urine aliquot(s)
- Analytical run instrument validation data (e.g., tune data)
- B *Sample* report (including numerical data for threshold substances*)
- Documentation of any deviations from the written screening procedures (if any)
- Reports and correspondence
- All facsimiles or letters related to analysis and reporting of *Sample* results

*For threshold substances, an estimate of the ratio or concentration or an estimate of the concentration relative to the threshold (i.e. 20 times the threshold concentration) is deemed acceptable.

ANNEX D
AAA SUPPLEMENTARY PROCEDURES

American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes

Amended and Effective as of May 1, 2009

Table of Contents

R-1. Applicability

The Commercial Arbitration Rules of the American Arbitration Association (AAA), as modified by these Supplementary Procedures for the Arbitration of Anti-Doping Rule Violations (Supplementary Procedures) shall apply to arbitrations, which arise out of the United States Anti-Doping Agency (USADA) Protocol. To the extent that there is any variance between the Commercial Arbitration Rules and the Supplementary Procedures, the Supplementary Procedures shall control.

R-2. AAA and Delegation of Duties

Anti-doping rule violation cases shall be administered by the AAA through the AAA Vice President then serving as the Secretary for the North American/Central American/ Caribbean Islands Decentralized Office of The Court of Arbitration for Sport or his/her designee (Administrator).

R-3. National Pool of Arbitrators

The Pool of AAA Arbitrators for anti-doping rule violation cases shall consist of the Court of Arbitration for Sport (CAS) Arbitrators who are citizens of the USA. (the Arbitrator Pool). Any reference to arbitrator in these rules shall also refer to an arbitration panel consisting of three arbitrators, if applicable. All arbitrators in the Arbitrator Pool shall have received training by the AAA.

R-4. Initiation by USADA

Arbitration proceedings shall be initiated by USADA by sending a notice to the athlete or other person charged with an anti-doping rule violation and the Administrator. The notice shall set forth (i) the offense and (ii) the sanction, consistent with the applicable International Federation rules, the mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol) and the United States Olympic Committee ("USOC") National Anti-Doping Policies, which USADA is seeking to have imposed and other possible sanctions, which could be imposed under the applicable International Federation rules, the mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol) and the USOC National Anti-Doping Policies. The notice shall also advise the athlete of the name, telephone number, e-mail address and website of the Athlete Ombudsman and shall include a copy of the USADA Protocol and these Supplemental Procedures. The parties to the proceeding shall be USADA and the athlete or other person charged with an anti-doping rule violation. The applicable International Federation and World Anti-Doping Association shall also be invited to join in the proceeding as a party or as an observer. The USOC shall be invited to join in the proceeding as an observer. The athlete or other person charged with an anti-doping rule violation shall have the right to invite the Athlete Ombudsman as an observer, but under no circumstances may any party or arbitrator compel the Athlete Ombudsman to testify as a witness. If the parties agree or the athlete or other person charged with an anti-doping rule violation requests and the arbitrator agrees, the hearing shall be open to the public.

R-5. Changes of Claim

After filing of a claim, if any party desires to make any new or different claim, it shall be made in writing and filed with the AAA. The party asserting such a claim shall provide a copy of the new or different claim to the other party or parties. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-6. Applicable Procedures

All cases shall be administered in accordance with Sections R-1 through R-51 of these rules.

At the request of any party, any time period set forth in these procedures may be shortened by the arbitrator(s) where doing so is reasonably necessary to resolve any athlete's eligibility before a protected competition, while continuing to protect the right of an athlete or other person charged with an anti-doping rule violation to a fair hearing. The shortened time periods shall not prohibit the athlete's or other person's right to request three (3) arbitrators.

If a request to expedite the adjudication process is made prior to the arbitration panel being appointed, the AAA shall randomly select one (1) arbitrator from the Arbitrator Pool, who shall determine whether the adjudication process shall be expedited and the schedule pursuant to which the process shall proceed. This randomly selected arbitrator shall not sit on the panel.

If a request to expedite the adjudication process is made after the arbitration panel is appointed, the arbitration panel shall determine whether the adjudication process shall be expedited and the schedule pursuant to which the process shall proceed.

The AAA shall immediately notify the Athlete Ombudsman and the USOC General Counsel's office of any arbitration that may be or has been initiated under these expedited procedures.

R-7. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matter.

R-9. Fixing of Locale

The locale of the arbitration shall be in the United States at a location determined by the Administrator using criteria established by the AAA but making every effort to give **preference to the choice of the athlete or other person charged with an anti-doping rule violation.**

R-10. Qualifications of an Arbitrator

a. Any arbitrator appointed pursuant to Section R-11, or selected by mutual choice of the parties or their appointees, shall be subject to disqualification for the reasons specified in Section R-14. If the parties specifically so agree in writing, the arbitrator shall not be subject to disqualification for those reasons.

b. Party-appointed arbitrators are expected to be neutral and may be disqualified for the reasons set forth in R-14.

R-11. Appointment of the Arbitration Panel

The arbitrator(s) shall be appointed in the following manner*:*

a. Immediately after the initiation of a proceeding by USADA (as set forth in R-4), the AAA shall send simultaneously to each party to the dispute an identical list of all names of persons in the Arbitrator Pool.

b. The proceeding shall be heard by one (1) arbitrator from the list of persons in the Arbitrator Pool (as set forth in R-3), unless within five (5) days following the initiation of the proceeding by USADA, a party elects instead to have the matter heard by a panel of three (3) arbitrators from the Arbitrator Pool (Arbitration Panel). Such election shall be in writing and served on the Administrator and the other parties to the proceeding.

c. If the proceeding is to be heard by one (1) arbitrator, that arbitrator shall be appointed as follows*:*

   i. Within ten (10) days following receipt of the Arbitrator Pool list provided by the Administrator under R-11a, the parties shall notify the Administrator of the name of the person who is mutually agreeable to the parties to serve as the arbitrator.

   ii. If the parties are unable to agree upon an arbitrator by the time set forth in paragraph c.i of this Rule, each party to the dispute shall have five (5) additional days in which to strike up to one third of the Arbitrator Pool, rank the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

d. If the proceeding is to be heard by a panel of three (3) arbitrators, those arbitrators shall be appointed as follows*:*

   i. Within five (5) days following receipt of the Arbitrator Pool list provided by the Administrator under R-11a or from receipt of notice of the request to have a three (3) arbitrator panel, whichever is later, USADA, or USADA and the International Federation, if a party, shall designate one (1) arbitrator from the Arbitrator Pool. The athlete or other person charged with an anti-doping rule violation shall have an additional five (5) days following receipt of the arbitrator choice from USADA, or from USADA and the International Federation, if a party, to designate one (1) arbitrator from the Arbitrator Pool.

   ii. The two (2) arbitrators chosen by the parties shall choose the third arbitrator from among the remaining members of the Arbitrator Pool. The AAA shall furnish to the party-appointed arbitrators the Arbitrator Pool list. If the two (2) arbitrators chosen by the parties are unable, within seven (7) days following their selection, to choose the third arbitrator, then the party-appointed arbitrators shall so notify the AAA which shall notify the parties. Within five (5) days of receipt of notice from the AAA that the party-selected arbitrators are unable to reach or have not reached agreement, the parties shall then each strike up to one third of the Arbitrator Pool and rank the remaining members in order of preference. From among the persons who have not been stricken by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of one (1) arbitrator to serve. The third arbitrator shall serve as Chair of the Arbitration Panel.

R-12. Number of Arbitrators

The number of arbitrators shall be one (1) unless any party requests three (3).

R-13. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether appointed mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules The signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

R-14. Disclosure and Challenge Procedure

a. Any person appointed as an arbitrator shall disclose to the AAA any circumstance likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.

b. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

c. Upon objection of a party to the continued service of an arbitrator, the AAA shall

determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

R-15. Communication with Arbitrator

a. No party and no one acting on behalf of any party shall communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator shall be sent to the AAA for transmittal to the arbitrator. No party and no one acting on behalf of any party shall communicate with any arbitrator concerning the selection of the third arbitrator.

b. Once the panel has been constituted, no party and no one acting on behalf of any party shall communicate unilaterally concerning the arbitration with any arbitrator.

R-16. Vacancies

a. If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

b. In the event of a vacancy in a panel of arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

c. In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-17. Preliminary Hearing

a. At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion. There is no administrative fee for the first preliminary hearing.

b. During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-18. Exchange of Information

a. At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

b. Unless otherwise agreed by the parties or ordered by the arbitrator, at least five (5) business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

c. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-19. Date, Time, and Place of Hearing

Except as may be mutually agreed by the parties or upon the request of a single party for good cause as may be determined by the arbitrator, the hearing, including any briefing ordered by the arbitrator, shall be completed within three (3) months of the appointment of the arbitrator. On good cause shown by any party, the hearing process shall be expedited as may be necessary in order the resolve the determination of an athlete's eligibility prior to any protected competition or team selection for a protected competition.

R-20. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the hearing is open to the public as prescribed in R-4 (the athlete or other person charged with an anti-doping rule violation have the right to invite the Athlete Ombudsman as an observer regardless). Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than (i) a party and its representatives and (ii) those entities identified in R-4, which may attend the hearing as observers. If the parties agree, or the athlete or other person charged with a doping offense requests and the arbitrator agrees, hearings or any portion thereof may also be conducted telephonically.

R-21. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three (3) days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-22. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-23. Stenographic Record

Any party desiring a stenographic record of all or a portion of the hearing shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three (3) days in advance of the start of the hearing or as required by the arbitrator. The requesting party or parties shall pay the cost of the transcript they request, whether full or partial. If a party seeks a copy of a transcript, full or partial,

requested by another party, then the other party shall pay half the costs of the transcript to the requesting party. If the entire transcript is requested by the parties jointly, or if all or a portion of the transcript is determined by the arbitrator to be the official record of the proceeding or necessary to the arbitrator's decision, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator with the costs of the transcription divided equally between the parties. The arbitrator may award the costs of transcription for a transcript requested by the arbitrator as expenses of the arbitration pursuant to R-48.

R-24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-25. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative. A party or parties causing a postponement of a hearing will be charged a postponement fee, as set forth in the administrative fee schedule.

R-26. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-27. Conduct of Proceedings

a. USADA shall present evidence to support its claim. The athlete or other person charged with an anti-doping rule violation shall then present evidence to support his/her defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

b. The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

c. The parties may agree to waive oral hearings in any case.

R-28. Evidence

a. The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

b. The arbitrator may only retain an expert or seek independent evidence if agreed to by the parties and (i) the parties agree to pay for the cost of such expert or independent evidence or (ii) the USOC agrees to pay for the cost of such expert or independent evidence. The parties shall have the right to examine any expert retained by the arbitrator and shall have the right to respond to any independent evidence obtained by the arbitrator.

c. The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

d. The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

e. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

f. Hearings conducted pursuant to these rules shall incorporate mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol). If the World Anti-Doping Code is silent on an issue, then the USADA Protocol, the USOC National Anti- Doping Policies, and the International Federation's anti-doping rules shall apply as determined by the arbitrator.

R-29. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

a. The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

b. If the parties agree, if any party requests and the arbitrator agrees, or if the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator within 30 days of the conclusion of the hearing. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-30. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-31. Interim Measures

The arbitrator may take whatever interim measures he or she deems necessary.

R-32. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. The arbitrator shall declare the hearing closed unless a party demonstrates that the record is incomplete and that such additional proof or witness(es) are pertinent and material to the controversy. If briefs are to be filed or a transcript of the hearing produced, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs; or receipt of the transcript. If documents are to be filed as provided in R-29, and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-33. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time required by R-38, the matter may not be reopened unless the parties agree on an extension of time.

R-34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-35. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-36. Serving of Notice

a. Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

b. The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (email), or other methods of communication.

c. Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-37. Majority Decision

When the panel consists of more than one arbitrator, a majority of the arbitrators must make all decisions.

R-38. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty (30) days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-39. Form of Award

Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law. In all cases, the arbitrator shall render a reasoned award.

R-40. Scope of Award

a. The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the World Anti-Doping Code, International Federation Rules, the USADA Protocol or the USOC Anti-Doping Policies.

b. In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards.

R-41. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award."

R-42. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

The AAA shall also provide a copy of the award (preferably in electronic form) to the appropriate National Governing Body, the USOC General Counsel's office and the Athlete Ombudsman.

The award is public and shall not be considered confidential.

R-43. Modification of Award

Within five (5) days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given five (5) days to respond to the request. The arbitrator shall dispose of the request within five (5) days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-44. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration. If the matter is appealed to CAS, the AAA shall furnish copies of documents required in connection with that proceeding.

R-45. Appeal Rights

The arbitration award may be appealed to CAS as provided in Annex A of the USADA Protocol, which incorporates the mandatory Articles on Appeals from the World Anti-Doping Code. Notice of appeal shall be filed with the Administrator within the time period provided in the CAS appellate rules. Appeals to CAS filed under these rules shall be heard in the United States. The decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law.

R-46. Applications to Court and Exclusion of Liability

a. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

b. Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

c. Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

d. Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

R-47. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee and any other administrative fee or charge shall be paid by the USOC.

R-48. Expenses

The expenses of witnesses for any party shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other reasonable and customary expenses of the arbitrator shall be paid by the USOC. The expenses associated with an expert retained by an arbitrator or independent evidence sought by an arbitrator shall be paid for as provided in R-28b.

R-49. Arbitrator's Compensation

a. Arbitrators shall be compensated at a rate consistent with the current CAS rates.

b. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties and the USOC.

c. Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

d. Arbitrator fees shall be paid by the USOC.

R-50. Payment of Fees, Expenses and Compensation for Citizens of a Country Other than USA

Notwithstanding R-47, R-48 and R-49, if the athlete or other person charged with an anti-doping rule violation is a citizen of a country other than the USA, then the authority requesting that USADA prosecute the anti-doping rule violation shall pay for the arbitration fees, expenses and arbitrator's compensation associated with the arbitration. The AAA may require such authority to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee. If such payments are not made, the AAA may order the suspension or termination of the proceeding.

R-51. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

ANNEX E

Language to be set forth in USADA correspondence offering an Athlete the opportunity to waive analysis of the Athlete's B specimen:

- The *Prohibited Substance* (or *Method*) **[identify substance or method]** was reported by the laboratory as being present in the A specimen of your *Sample*.
- The World Anti-Doping *Code* requires that unless the *Athlete* waives the B *Sample* analysis, for an anti-doping rule violation involving the presence of a *Prohibited Substance* to be found, the *Prohibited Substance* or *Method* must be found by the laboratory in both the A specimen and B specimen of the *Athlete's Sample*.
- You and/or your representative have the right to be present, at your expense, to observe the B specimen opening and analysis.
- By waiving the testing of the B specimen, you accept the laboratory results, including the finding of **[the substance or method identified]** in your *Sample*. Under applicable anti-doping rules, the finding of a *Prohibited Substance* or *Method* in an *Athlete's Sample* constitutes an anti-doping rule violation.
- The sanctions which may be imposed on you if an anti-doping rule violation is found include **[describe potential sanctions]**.
- You may wish to contact the USOC Athlete Ombudsman, who is completely independent of USADA, or your own personal attorney for assistance or further information. The Athlete Ombudsman may be reached at the U.S. Olympic Committee, One Olympic Plaza, Colorado Springs, CO 80909; by telephone at 719-866-5000; by fax at 719-866-3000; by website at www.athleteombudsman.org or by email at athlete.ombudsman@usoc.org.
- A copy of the USADA Protocol with attachments is enclosed with this letter.

ANNEX F

Retirement Rules:

In accordance with the USOC NADP, any *Athlete* enrolled in the USADA *Registered Testing Pool* ("USADA *RTP*") who wishes to be removed from the program on account of retirement, must promptly notify in writing, USADA and the applicable National Governing Body ("NGB"). **Additionally, it is important for you to check with your particular International Federation ("IF") to ensure compliance with any required IF retirement procedures or policies.**

- If you retire, you will be removed immediately from the USADA *RTP*. In accordance with the World Anti-Doping *Code* and USOC NADP, if you retire and then subsequently wish to return to active participation in sport, you shall not be permitted to compete in *International* or *National Events* until you have made yourself available for *Testing* by providing six (6) months prior notice of your return from retirement to your IF and USADA. It is important for you to confirm whether your particular IF has additional requirements you will be required to satisfy in order to regain your full eligibility to compete after your return from retirement.
- Any *Athlete* seeking an exemption from the six (6) month written notice requirement must apply to *WADA* for a waiver and follow *WADA's* established policies, rules and procedures. Only *WADA* may grant exemptions to the six (6) month written notice requirement and such exemptions will only be granted where the strict application of the rule would be manifestly unfair to the *Athlete*.

NOTES

USADA MISSION STATEMENT

We hold the public trust to:

PRESERVE the integrity of Competition

INSPIRE true sport

PROTECT the rights of U.S. Athletes

U.S. Anti-Doping Agency
Phone: 719.785.2000
Toll-Free: 1.866.601.2632
www.USADA.org

@usantidoping

facebook.com/usantidoping

Tribunal Arbitral du Sport  Court of Arbitration for Sport

Code de l'arbitrage en matière de sport

Entré en vigueur le 1er janvier 2017

Code of Sports-related Arbitration

In force as from 1 January 2017

Statutes of the Bodies Working for the Settlement of Sports-Related Disputes

A Joint Dispositions

S1 In order to resolve sports-related disputes through arbitration and mediation, two bodies are hereby created:

- **the International Council of Arbitration for Sport ("ICAS")**
- **the Court of Arbitration for Sport ("CAS").**

The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of the bodies or a specific agreement so provide.

The seat of both ICAS and CAS is Lausanne, Switzerland.

S2 The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.

S3 CAS maintains a list of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels composed of one or three arbitrators.

CAS comprises of an Ordinary Arbitration Division and an Appeals Arbitration Division.

CAS maintains a list of mediators and provides for the resolution of sports-related disputes through mediation. The mediation procedure is governed by the CAS Mediation Rules.

B The International Council of Arbitration for Sport (ICAS)

1 Composition

S4 ICAS is composed of twenty members, experienced jurists appointed in the following manner:

a. four members are appointed by the International Sports Federations ("IFs"), *viz.* three by the Association of Summer Olympic IFs ("ASOIF") and one by the Association of Winter Olympic IFs ("AIOWF"), chosen from within or outside their membership;
b. four members are appointed by the Association of the National Olympic Committees ("ANOC"), chosen from within or outside its membership;
c. four members are appointed by the International Olympic Committee ("IOC"), chosen from within or outside its membership;
d. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
e. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

S5 The members of ICAS are appointed for one or several renewable period(s) of four years. Such nominations shall take place during the last year of each four-year cycle.

Upon their appointment, the members of ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43.

Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.

If a member of the ICAS resigns, dies or is prevented from carrying out her/his functions for any other reason, she/he is replaced, for the remaining period of her/his mandate, in conformity with the terms applicable to her/his appointment.

ICAS may grant the title of Honorary Member to any former ICAS member who has made an exceptional contribution to the development of ICAS or CAS. The title of Honorary Member may be granted posthumously.

2 Attributions

S6 ICAS exercises the following functions:

1. It adopts and amends this Code;
2. It elects from among its members for one or several renewable period(s) of four years:
   - the President,
   - two Vice-Presidents who shall replace the President if necessary, by order of seniority in age; if the office of President becomes vacant, the senior Vice-President shall exercise the functions and responsibilities of the President until the election of a new President,
   - the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS,

- the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions;

The election of the President and of the Vice-Presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The election of the President, Vice-Presidents, Division Presidents and their deputies shall take place at the ICAS meeting following the appointment of the ICAS members for the forthcoming period of four years.

3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists;
4. It resolves challenges to and removals of arbitrators, and performs any other functions identified in the Procedural Rules;
5. It is responsible for the financing of CAS. For such purpose, *inter alia*:

5.1 it receives and manages the funds allocated to its operations;

5.2 it approves the ICAS budget prepared by the CAS Court Office;

5.3 it approves the annual accounts of CAS prepared by the CAS Court Office;

6. It appoints the CAS Secretary General and may terminate her/his duties upon proposal of the President;
7. It supervises the activities of the CAS Court Office;
8. It provides for regional or local, permanent or *ad hoc* arbitration;
9. It may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund;
10. It may take any other action which it deems necessary to protect the rights of the parties and to promote the settlement of sports-related disputes through arbitration and mediation.

S7 ICAS exercises its functions itself, or through its Board, consisting of the President, the two Vice-Presidents of the ICAS, the President of the Ordinary Arbitration Division and the President of the CAS Appeals Arbitration Division.

The ICAS may not delegate to the Board the functions listed under Article S6, paragraphs 1, 2, 5.2 and 5.3.

3 Operation

S8 1. ICAS meets whenever the activity of CAS so requires, but at least once a year.

A quorum at meetings of the ICAS consists of at least half its members. . Decisions are taken during meetings or by correspondence by a majority of the votes cast. Abstentions and blank or spoiled votes are not taken into consideration in the calculation of the required majority. Voting by proxy is not allowed. Voting is held by secret ballot if the President so decides or upon the request of at least a quarter of the members present. The President has a casting vote in the event of a tie.

2. Any modification of this Code requires a majority of two-thirds of the ICAS members. Furthermore, the provisions of Article S8.1 apply.

3. Any ICAS member is eligible to be a candidate for the ICAS Presidency. Registration as a candidate shall be made in writing and filed with the Secretary General no later than four months prior to the election meeting.

   The election of the ICAS President shall take place at the ICAS meeting following the appointment of the ICAS members for a period of four years. The quorum for such election is three-quarters of the ICAS members. The President is elected by an absolute majority of the members present. If there is more than one candidate for the position of President, successive rounds of voting shall be organized. If no absolute majority is attained, the candidate having the least number of votes in each round shall be eliminated. In the case of a tie among two or more candidates, a vote between those candidates shall be organized and the candidate having the least number of votes shall be eliminated. If following this subsequent vote, there is still a tie, the candidate(s) senior in age is(are) selected.

   If a quorum is not present or if the last candidate in the voting rounds, or the only candidate, does not obtain an absolute majority in the last round of voting, the current president shall remain in her/his position until a new election can be held. The new election shall be held within four months of the unsuccessful election and in accordance with the above rules, with the exception that the President is elected by a simple majority when two candidates or less remain in competition.

   The election is held by secret ballot. An election by correspondence is not permitted.

4. The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to ICAS.

S9 The President of ICAS is also President of CAS. She/he is responsible for the ordinary administrative tasks pertaining to the ICAS.

S10 The Board of ICAS meets at the invitation of the ICAS President.

The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to the Board.

A quorum of the Board consists of three of its members. Decisions are taken during meetings or by correspondence by a simple majority of those voting; the President has a casting vote in the event of a tie.

S11 A member of ICAS or the Board may be challenged when circumstances allow legitimate doubt to be cast on her/his independence *vis-à-vis* a party to an arbitration

which must be the subject of a decision by ICAS or the Board pursuant to Article S6, paragraph 4. She/he shall pre-emptively disqualify herself/himself when the subject of a decision is an arbitration procedure in which a sports-related body to which she/he belongs appears as a party or in which a member of the law firm to which she/he belongs is an arbitrator or counsel.

ICAS, with the exception of the challenged member, shall determine the process with respect to the procedure for challenge.

The disqualified member shall not take part in any deliberations concerning the arbitration in question and shall not receive any information on the activities of ICAS and the Board concerning such arbitration.

C The Court of Arbitration for Sport (CAS)

1 Mission

S12 CAS constitutes Panels which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules (Articles R27 et seq.).

For such purpose, CAS provides the necessary infrastructure, effects the constitution of Panels and oversees the efficient conduct of the proceedings.

The responsibilities of Panels are, *inter alia*:

a. to resolve the disputes referred to them through ordinary arbitration ;
b. to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide
c. to resolve the disputes that are referred to them through mediation.

2 Arbitrators and mediators

S13 The personalities designated by ICAS, pursuant to Article S6, paragraph 3, appear on the CAS list for one or several renewable period(s) of four years. ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment.

There shall be not less than one hundred fifty arbitrators and fifty mediators.

S14 The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes.

The ICAS shall appoint personalities to the list of CAS mediators with experience in mediation and a good knowledge of sport in general.

S15 ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof.

S16 When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures.

S17 Subject to the provisions of the Procedural Rules (Articles R27 et seq.), if a CAS arbitrator resigns, dies or is unable to carry out her/his functions for any other reason, she/he may be replaced, for the remaining period of her/his mandate, in conformity with the terms applicable to her/his appointment.

S18 Arbitrators who appear on the CAS list may serve on Panels constituted by either of the CAS Divisions.

Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

S19 CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS and/or CAS.

3 Organisation of the CAS

S20 The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.

a. **The Ordinary Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or her/his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 et seq.).

b. **The Appeals Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It performs, through the intermediary of its President or her/his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 et seq.).

Arbitration proceedings submitted to CAS are assigned by the CAS Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity. In the event of a change of circumstances during the proceedings, the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division. Such re-assignment shall not affect the constitution of the Panel nor the validity of any proceedings, decisions or orders prior to such re-assignment.

The CAS mediation system operates pursuant to the CAS Mediation Rules.

S21 The President of either Division may be challenged if circumstances exist that give rise to legitimate doubts with regard to her/his independence *vis-à-vis* one of the parties to an arbitration assigned to her/his Division. She/he shall pre-emptively disqualify herself/himself if, in arbitration proceedings assigned to her/his Division, one of the parties is a sports-related body to which she/he belongs, or if a member of the law firm to which she/he belongs is acting as arbitrator or counsel.

ICAS shall determine the procedure with respect to any challenge. The challenged President shall not participate in such determination.

If the President of a Division is challenged, the functions relating to the efficient running of the proceedings conferred upon her/him by the Procedural Rules (Articles R27 et seq.), shall be performed by her/his deputy or by the CAS President, if the deputy is also challenged. No disqualified person shall receive any information concerning the activities of CAS regarding the arbitration proceedings giving rise to her/his disqualification.

S22 CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required.

The CAS Court Office performs the functions assigned to it by this Code.

D Miscellaneous Provisions

S23 These Statutes are supplemented by the Procedural Rules adopted by ICAS.

S24 The English text and the French text are authentic. In the event of any divergence, the French text shall prevail.

S25 These Statutes may be amended by decision of the ICAS pursuant to Article S8.

S26 These Statutes and Procedural Rules come into force by the decision of ICAS, taken by a two-thirds majority.

Procedural Rules

A General Provisions

R27 Application of the Rules

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.

R28 Seat

The seat of CAS and of each Arbitration Panel ("Panel") is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.

R29 Language

The CAS working languages are French and English. In the absence of agreement between the parties, the President of the Panel or, if she/he has not yet been appointed, the President of the relevant Division, shall select one of these two languages as the language of the arbitration at the outset of the procedure, taking into account all relevant circumstances. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the Panel agree otherwise.

The parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree. If agreed, the CAS Court Office determines with the Panel the conditions related to the choice of the language; the Panel may order that the parties bear all or part of the costs of translation and interpretation. If a hearing is to be held, the Panel may allow a party to use a language other than that chosen for the arbitration, on condition that it provides, at its own cost, interpretation into and from the official language of the arbitration.

The Panel or, prior to the constitution of the Panel, the Division President may order that all documents submitted in languages other than that of the proceedings be filed together with a certified translation in the language of the proceedings.

R30 Representation and Assistance

The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office.

R31 Notifications and Communications

All notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office. The notifications and communications shall be sent to the address shown in the arbitration request or the statement of appeal, or to any other address specified at a later date.

All arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt.

The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted in advance by facsimile or by electronic mail at the official CAS email address (procedures@tas-cas.org), the filing is valid upon receipt of the facsimile or of the electronic mail by the CAS Court Office provided that the written submission and its copies are also filed by courier within the first subsequent business day of the relevant time limit, as mentioned above.

Filing of the above-mentioned submissions by electronic mail is permitted under the conditions set out in the CAS guidelines on electronic filing.

The exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified; the CAS Court Office may then forward them by the same means. Any other communications from the parties intended for the CAS Court Office or the Panel shall be sent by courier, facsimile or electronic mail to the CAS Court Office.

R32 Time limits

The time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location of their own domicile or, if represented, of the domicile of their main legal

representative, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the location from where the document is to be sent, the time limit shall expire at the end of the first subsequent business day.

Upon application on justified grounds and after consultation with the other party (or parties), either the President of the Panel or, if she/he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General without consultation with the other party (-ies).

The Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.

R33 Independence and Qualifications of Arbitrators

Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties.

Every arbitrator shall appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code, shall have a good command of the language of the arbitration and shall be available as required to complete the arbitration expeditiously.

R34 Challenge

An arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the ICAS Board, which has the discretion to refer a case to ICAS. The challenge of an arbitrator shall be lodged by the party raising it, in the form of a petition setting forth the facts giving rise to the challenge, which shall be sent to the CAS Court Office. The ICAS Board or ICAS shall rule on the challenge after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments. Such comments shall be communicated by the CAS Court Office to the parties and to the other arbitrators, if any. The ICAS Board or ICAS shall give brief reasons for its decision and may decide to publish it.

R35 Removal

An arbitrator may be removed by the ICAS if she/he refuses to or is prevented from carrying out her/his duties or if she/he fails to fulfil her/his duties pursuant to this Code within a reasonable time. ICAS may exercise such power through its Board The Board shall invite the parties, the arbitrator in question and the other arbitrators, if any, to submit written comments and shall give brief reasons for its decision. Removal of an arbitrator cannot be requested by a party.

R36 Replacement

In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the provisions applicable to her/his appointment. If, within the time limit fixed by the CAS Court Office, the Claimant/Appellant does not appoint an arbitrator to replace the arbitrator it had initially appointed, the arbitration shall not be initiated or, in the event it has been already initiated, shall be terminated. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement.

R37 Provisional and Conservatory Measures

No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted.

Upon filing of the request for provisional measures, the Applicant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—, without which CAS shall not proceed. The CAS Court Office fee shall not be paid again upon filing of the request for arbitration or of the statement of appeal in the same procedure.

The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the Panel may, upon application by a party, make an order for provisional or conservatory measures. In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.

Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party (or parties) to express a position within ten days or a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order on an expedited basis and shall first rule on the *prima facie* CAS jurisdiction. The Division President may terminate the arbitration procedure if she/he rules that the CAS clearly has no jurisdiction. In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is subsequently heard.

When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect

the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).

The procedure for provisional measures and the provisional measures already granted, if any, are automatically annulled if the party requesting them does not file a related request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Article R49 of the Code (appeals procedure). Such time limits cannot be extended.

Provisional and conservatory measures may be made conditional upon the provision of security.

B Special Provisions Applicable to the Ordinary Arbitration Procedure

R38 Request for Arbitration

The party intending to submit a matter to arbitration under these Procedural Rules (Claimant) shall file a request with the CAS Court Office containing:

- the name and full address of the Respondent(s);
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- its request for relief;
- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these Procedural Rules;
- any relevant information about the number and choice of the arbitrator(s); if the relevant arbitration agreement provides for three arbitrators, the name of the arbitrator from the CAS list of arbitrators chosen by the Claimant.

Upon filing its request, the Claimant shall pay the Court Office fee provided in Article R64.1.

If the above-mentioned requirements are not fulfilled when the request for arbitration is filed, the CAS Court Office may grant a single short deadline to the Claimant to complete the request, failing which the CAS Court Office shall not proceed.

R39 Initiation of the Arbitration by CAS and Answer – CAS Jurisdiction

Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. It shall communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s) from the CAS list, as well as to file an answer to the request for arbitration.

The answer shall contain:

- a brief statement of defence;
- any defence of lack of jurisdiction;
- any counterclaim.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant of its share of the advance of costs provided by Article R64.2 of this Code.

The Panel shall rule on its own jurisdiction, irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Where a party files a request for arbitration related to an arbitration agreement and facts similar to those which are the subject of a pending ordinary procedure before CAS, the President of the Panel, or if she/he has not yet been appointed, the President of the Division, may, after consulting the parties, decide to consolidate the two procedures.

R40 Formation of the Panel

R40.1 Number of Arbitrators

The Panel is composed of one or three arbitrators. If the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine the number, taking into account the circumstances of the case. The Division President may then choose to appoint a Sole arbitrator when the Claimant so requests and the Respondent does not pay its share of the advance of costs within the time limit fixed by the CAS Court Office.

R40.2 Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

If, by virtue of the arbitration agreement or a decision of the President of the Division, a sole arbitrator is to be appointed, the parties may select her/him by mutual agreement within a time limit of fifteen days set by the CAS Court Office upon receipt

of the request. In the absence of agreement within that time limit, the President of the Division shall proceed with the appointment.

If, by virtue of the arbitration agreement, or a decision of the President of the Division, three arbitrators are to be appointed, the Claimant shall nominate its arbitrator in the request or within the time limit set in the decision on the number of arbitrators, failing which the request for arbitration is deemed to have been withdrawn. The Respondent shall nominate its arbitrator within the time limit set by the CAS Court Office upon receipt of the request. In the absence of such appointment, the President of the Division shall proceed with the appointment in lieu of the Respondent. The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel.

R40.3 Confirmation of the Arbitrators and Transfer of the File

An arbitrator nominated by the parties or by other arbitrators shall only be deemed appointed after confirmation by the President of the Division, who shall ascertain that each arbitrator complies with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs provided by Article R64.2 of the Code.

An *ad hoc* clerk independent of the parties may be appointed to assist the Panel. Her/his fees shall be included in the arbitration costs.

R41 Multiparty Arbitration

R41.1 Plurality of Claimants / Respondents

If the request for arbitration names several Claimants and/or Respondents, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1.

If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed and there are several Claimants, the Claimants shall jointly nominate an arbitrator. If three arbitrators are to be appointed and there are several Respondents, the Respondents shall jointly nominate an arbitrator. In the absence of such a joint nomination, the President of the Division shall proceed with the particular appointment.

If there are three or more parties with divergent interests, both arbitrators shall be appointed in accordance with the agreement between the parties. In the absence of

agreement, the arbitrators shall be appointed by the President of the Division in accordance with Article R40.2.

In all cases, the arbitrators shall select the President of the Panel in accordance with Article R40.2.

R41.2 Joinder

If a Respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefor, and file an additional copy of its answer. The CAS Court Office shall communicate this copy to the person whose participation is requested and fix a time limit for such person to state its position on its participation and to submit a response pursuant to Article R39. It shall also fix a time limit for the Claimant to express its position on the participation of the third party.

R41.3 Intervention

If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.

R41.4 Joint Provisions on Joinder and Intervention

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the *prima facie* existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of *amicus curiae* briefs, on such terms and conditions as it may fix.

R42 Conciliation

The President of the Division, before the transfer of the file to the Panel, and thereafter the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

R43 Confidentiality

Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.

R44 Procedure before the Panel

R44.1 Written Submissions

The proceedings before the Panel comprise written submissions and, in principle, an oral hearing. Upon receipt of the file and if necessary, the President of the Panel shall issue directions in connection with the written submissions. As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response. The parties may, in the statement of claim and in the response, raise claims not contained in the request for arbitration and in the answer to the request. Thereafter, no party may raise any new claim without the consent of the other party.

Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.

In their written submissions, the parties shall list the name(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other

evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.

If a counterclaim and/or jurisdictional objection is filed, the CAS Court Office shall fix a time limit for the Claimant to file an answer to the counterclaim and/or jurisdictional objection.

R44.2 Hearing

If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the Respondent is heard last.

The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant. Unless the parties agree otherwise, the hearings are not public. Minutes of the hearing may be taken. Any person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person.

The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.

The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, she/he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.

The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance.

Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanctions of perjury.

Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.

R44.3 Evidentiary Proceedings Ordered by the Panel

A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.

If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts.

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The expert shall be independent of the parties. Before appointing her/him, the Panel shall invite her/him to immediately disclose any circumstances likely to affect her/his independence with respect to any of the parties.

R44.4 Expedited Procedure

With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.

R44.5 Default

If the Claimant fails to submit its statement of claim in accordance with Article R44.1 of the Code, the request for arbitration shall be deemed to have been withdrawn.

If the Respondent fails to submit its response in accordance with Article R44.1 of the Code, the Panel may nevertheless proceed with the arbitration and deliver an award.

If any of the parties, or its witnesses, has been duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing and deliver an award.

R45 Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono.

R46 Award

The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to delivery of the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the original award. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.

C Special Provisions Applicable to the Appeal Arbitration Procedure

R47 Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

R48 Statement of Appeal

The Appellant shall submit to CAS a statement of appeal containing:

- the name and full address of the Respondent(s);
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against, together with reasons;
- a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS.

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed.

R49 Time limit for Appeal

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties.

R50 Number of Arbitrators

The appeal shall be submitted to a Panel of three arbitrators, unless the parties have agreed to a Panel composed of a sole arbitrator or, in the absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent pays its share of the advance of costs within the time limit fixed by the CAS Court Office.

When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide.

R51 Appeal Brief

Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which it intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit.

In its written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, it intends to call and state any other evidentiary measure which it requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

R52 Initiation of the Arbitration by the CAS

Unless it appears from the outset that there is clearly no arbitration agreement referring to CAS, that the agreement is clearly not related to the dispute at stake or that the internal legal remedies available to the Appellant have clearly not been exhausted, CAS shall take all appropriate actions to set the arbitration in motion. The CAS Court Office shall communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Articles R53 and R54. If applicable, she/he shall also decide promptly on any application for a stay or for interim measures.

The CAS Court Office shall send a copy of the statement of appeal and appeal brief to the authority which issued the challenged decision, for information.

The CAS Court Office may publicly announce the initiation of any appeals arbitration procedure and, at a later stage and where applicable, the composition of the arbitral panel and the hearing date, unless the parties agree otherwise.

With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure.

Where a party files a statement of appeal in connection with a decision which is the subject of a pending appeal before CAS, the President of the Panel, or if she/he has not yet been appointed, the President of the Division, may decide, after inviting submissions from the parties, to consolidate the two procedures.

R53 Nomination of Arbitrator by the Respondent

Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall make the appointment.

R54 Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by CAS

If, by virtue of the parties' agreement or of a decision of the President of the Division, a sole arbitrator is to be appointed, the President of the Division shall appoint the sole arbitrator upon receipt of the motion for appeal or as soon as a decision on the number of arbitrators has been rendered.

If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators. The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation of the Panel and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs in accordance with Article R64.2 of the Code.

An *ad hoc* clerk, independent of the parties, may be appointed to assist the Panel. Her/his fees shall be included in the arbitration costs.

Article R41 applies mutatis mutandis to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division.

R55 Answer of the Respondent – CAS Jurisdiction

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing:

- a statement of defence;
- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts it intends to call, stating their area of expertise, and state any other evidentiary measure which it requests.

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of its share of the advance of costs in accordance with Article R64.2.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

R56 Appeal and answer complete – Conciliation

Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to

specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

The Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

R57 Scope of Panel's Review – Hearing

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.

If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.

R58 Law Applicable to the merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

R59 Award

The award shall be rendered by a majority decision, or in the absence of a majority, by the President alone. It shall be written, dated and signed. The award shall state brief reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice.

Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to

fundamental issues of principle. Dissenting opinions are not recognized by CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the original award. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

A copy of the operative part of the award, if any, and of the full award shall be communicated to the authority or sports body which has rendered the challenged decision, if that body is not a party to the proceedings.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.

D Special Provisions Applicable to the Consultation Proceedings

R60 [abrogated]

R61 [abrogated]

R62 [abrogated]

E Interpretation

R63 A party may, not later than 45 days following the notification of the award, apply to CAS for the interpretation of an award issued in an ordinary or appeals arbitration, if the operative part of the award is unclear, incomplete, ambiguous, if its components

are self-contradictory or contrary to the reasons, or if the award contains clerical mistakes or mathematical miscalculations.

When an application for interpretation is filed, the President of the relevant Division shall review whether there are grounds for interpretation. If so, she/he shall submit the request for interpretation to the Panel which rendered the award. Any Panel members who are unable to act at such time shall be replaced in accordance with Article R36. The Panel shall rule on the request within one month following the submission of the request for interpretation to the Panel.

F Costs of the Arbitration Proceedings

R64 General

R64.1 Upon filing of the request/statement of appeal, the Claimant/Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—, without which the CAS shall not proceed. The Panel shall take such fee into account when assessing the final amount of costs.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. She/he may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R64.2 Upon formation of the Panel, the CAS Court Office shall fix, subject to later changes, the amount, the method and the time limits for the payment of the advance of costs. The filing of a counterclaim or a new claim may result in the calculation of additional advances.

To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision applies *mutatis mutandis* to any counterclaim.

R64.3 Each party shall pay for the costs of its own witnesses, experts and interpreters.

If the Panel appoints an expert or an interpreter, or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.

R64.4 At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the *ad hoc* clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters.

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs.

R64.5 In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

R65 Appeals against decisions issued by international federations in disciplinary matters

R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue.

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. She/he may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel.

R66 Consultation Proceedings

[abrogated]

G Miscellaneous Provisions

R67 These Rules are applicable to all procedures initiated by the CAS as from 1 January 2017. The procedures which are pending on 1 January 2017 remain subject to the Rules in force before 1 January 2017, unless both parties request the application of these Rules.

R68 CAS arbitrators, CAS mediators, ICAS and its members, CAS and its employees are not liable to any person for any act or omission in connection with any CAS proceeding.

R69 The French text and the English text are authentic. In the event of any discrepancy, the French text shall prevail.

R70 The Procedural Rules may be amended pursuant to Article S8.

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

UNITED STATES ANTI-DOPING AGENCY,

Claimant

and

ROBERT DOSTERSCHILL,

Respondent

Re: AAA Case No. 01-16-0004-4862

PARTIAL FINAL AWARD ON JURISDICTION

We, the undersigned Arbitrators (the "Panel"), having been designated by the above-named parties and having been duly seated and having duly considered the submissions, exhibits and arguments of the parties and, after a hearing held via teleconference on February 16, 2017, in accordance with the American Arbitration Association's Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes (the "Supplemental Procedures") do hereby find and issue this Partial Final Award on Jurisdiction (the "Award"), as follows:

I. Introduction

1. As a result of the parties' agreement to bifurcate the proceedings, the issue before the Panel at this time is whether USADA has the authority to manage the results of testing conducted on a urine sample collected from Respondent at the 2016 Arnold Weightlifting Championships in Columbus, Ohio.

2. Respondent is a member of USA Weightlifting ("USAW"), which is the National Governing Body ("NGB") for the sport of weightlifting in the United States, and is recognized as such by the United States Olympic Committee ("USOC"). The event where Respondent's sample was collected, the 2016 Arnold Weightlifting Championships, was sanctioned by USAW and was listed on the calendar of the International Weightlifting Federation (the "IWF"), the international federation for the sport of weightlifting recognized as such by the International Olympic Committee ("IOC").

3. While Article 3 of the USADA Protocol for Olympic and Paralympic Movement Testing (the "USADA Protocol") specifies that its terms apply to athletes who are members of NGBs and also to athletes who participate in events sanctioned by NGBs, athletes must be provided notice that they are subject to and bound by the terms of the USADA Protocol. The Panel finds that USAW failed to provide adequate notice to Respondent in the "USA Weightlifting Membership Waiver and Code of Conduct" form (the "USAW Membership Form") that Respondent completed when he became a member of USAW.

4. However, the online registration form that Respondent completed prior to competing in the 2016 Arnold Weightlifting Championships (the "Registration Form") (basically, the entry form) informed Respondent that he would be subject to drug testing and that the meet organizers would be using the "United States Anti-Doping Agency's In-Competition Program." Although USAW delegated the responsibility for sample collection to a third party, it initiated and directed the collection process, was ultimately responsible for managing the drug testing process and, as set forth in detail below, had the right to delegate results management authority to USADA.

5. The Panel finds that USADA has results management authority in this case, and therefore denies Respondent's request to dismiss USADA's claim against him.

6. The Panel also finds that Respondent is not responsible for any costs or expenses related to the testing or analysis of his sample that was collected at the 2016 Arnold Weightlifting Championships.

II. Power of the Panel to Rule on Jurisdiction

4. The Panel notes that, pursuant to R-7 (Jurisdiction) of the Supplemental Procedures, it has "the power to rule on [its] own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement" and that it "may rule on such objections as a preliminary matter or as part of the final award." This provision is consistent with the AAA Commercial Arbitration Rules, generally accepted practice, and the principle of *kompetenz kompetenz* in international commercial arbitration.

III. The Parties

5. The United States Anti-Doping Agency ("USADA" or "Claimant") is the independent anti-doping agency for Olympic and Paralympic sports in the United States recognized as such by the USOC and conducts drug testing, investigates anti-doping rule violations, manages results, and adjudicates anti-doping rule violation disputes. Claimant was represented at the telephonic hearing, which was more of an oral argument rather then the presentation of evidence at a merits hearing, by Jeffrey T. Cook, Esq., Director of Legal Affairs of USADA.

6. The Respondent, Robert "Kyle" Dosterschill is an athlete in the sport of weightlifting. He was represented at the hearing by Howard L. Jacobs, Esq. of the Law Offices of Howard L. Jacobs.

IV. Rules Applicable to this Dispute

7. The Respondent is a member of USAW, the NGB for the sport of weightlifting in the United States, recognized as such by the USOC.

8. When Respondent became a member of USAW, he signed the USAW Membership Form, pursuant to which he agreed to "[a]bide by all USA Weightlifting and International Weightlifting Federation rules, selection procedures and safety guidelines." (Ex. 3, USAW Code of Conduct).

9. Relevant sections from USAW's "rules," the International Weightlifting Federation ("IWF") Anti-Doping Policy ("IWF Anti-Doping Policy"), the USOC National Anti-Doping Policy ("USOC Policy"), the World Anti-Doping Code (the "Code") and the World Anti-Doping Agency ("WADA") International Standard for Testing and Investigations ("ISTI") are set forth below.

A. USA Weightlifting

10. As discussed in more detail below, while the USAW Membership Form refers to USAW's "rules," the NBG has no rules that address anti-doping. Although the USAW website at http://www.teamusa.org/USA-Weightlifting includes a number of pages related to anti-doping and USADA, there is no set of stand-alone rules that are applicable in this matter.

B. International Weightlifting Federation

11. The relevant provisions of the IWF Anti-Doping Rules are as follows:

SCOPE OF THESE ANTI-DOPING RULES

"These Anti-Doping Rules shall apply to IWF and to each of its Member Federations. They also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, as a condition of his/her membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of IWF to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8, Article 7.10 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules:

a. all Athletes and Athlete Support Personnel who are members of any Member Federation, or of any member or affiliate organization of any Member Federation (including any clubs, teams, associations or leagues);

b. all Athletes and Athlete Support Personnel participating in such capacity in Events, Competitions and other activities organized, convened, authorized or recognized by IWF, or any Member Federation, or any member or affiliate organization of any Member Federation (including any clubs, teams, associations or leagues), wherever held . . .?

Article 5.3 Event Testing

"5.3.5 The overall costs of Testing and Sample analysis is the responsibility of the organizing committee and/or the Member Federation of the country in which the Competition or Event is taking place. IWF may at its own discretion decide to take responsibility for those costs."

Article 7.1 Responsibility for Conducting Results Management

"7.1.1 The circumstances in which IWF shall take responsibility for conducting results management in respect of anti-doping rule violations involving Athletes and other Persons under its jurisdiction shall be determined by reference to and in accordance with Article 7 of the Code."

C. United States Anti-Doping Policy

12. Section 14.1 of the USOC Policy acknowledges that:

"The Code requires that each Signatory [must] establish rules and procedures to ensure that all Athletes . . . under the authority of the Signatory and its member organizations are informed of, and agree to be bound by, anti-doping rules in force of the relevant anti-doping organizations. To implement this requirement, each NGB . . . shall be responsible for informing Athletes . . . in its sport of this USOC National Anti-Doping Policy and of the USADA Protocol."

D. World Anti-Doping Code

13. Article 7.1 of the Code (Responsibility for Conducting Results Management) states as follows:

"Except as provided in Articles 7.1.1 and 7.1.2 below, results management and hearings shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection . . ."

E. International Standard for Testing and Investigations

14. Relevant sections of the ISTI are as follows:

*"**Sample Collection Authority**: The organisation that is responsible for the collection of Samples in compliance with the requirements of the International Standard for Testing and Investigations, whether (1) the Testing Authority itself; or (2) another organization (for example, a third party contractor) to whom the Testing Authority has delegated or subcontracted such responsibility (provided that the Testing Authority always remains ultimately responsible under the Code for compliance with the requirements of the International Standard for Testing and Investigations relating to collection of Samples)."*

*"**Testing Authority**: The organization that has authorized a particular Sample collection, whether (1) an Anti-Doping Organization (for example, the International Olympic Committee or other Major Event Organization, WADA, an International Federation, or a National Anti-Doping Organization); or (2) another organization conducting Testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization (for example, a National Federation that is a member of an International Federation)."*

V. Burden and Standard of Proof

15. Respondent asserts that USADA bears the burden of establishing that USADA has the authority to manage the results of the testing of Respondent's sample. Since USADA did not dispute that it bears this burden, the Panel accepts that this is the appropriate burden of proof in this matter.

16. With respect to the standard of proof, Article 3 of the USADA Protocol (Burdens and Standards of Proof) specifies:

> *"The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt."*

17. The Panel is of the view that, while the issue before it is jurisdictional rather than a consideration of the merits, the applicable standard in this situation is "the comfortable satisfaction of the hearing panel." This view is informed by the absence of any guidance in the Code save for the language in Article 3.1, which is identical to the language in the USADA Protocol set forth in paragraph 16, *supra*.

18. Given the lack of any carve out or exception for jurisdictional matters, and the general rule just referenced, the Panel is of the view that "whether the Anti-Doping Organization has established an anti-doping rule violation" includes whether the Anti-Doping Organization has established jurisdiction. As such, no lesser standard than comfortable satisfaction would be appropriate under the Code when considering whether an Anti-Doping Organization has established jurisdiction.

VI. Proceedings in this Matter

19. On March 5, 2016, Respondent competed in the 2016 Arnold Weightlifting Championships, where he was selected for drug testing.

20. In a letter dated April 27, 2016, USADA notified Respondent that his sample "collected at the Arnold Weightlifting Championships on March 5, 2016 by USA Powerlifting," had tested positive for several banned substances. USADA's letter explained to Respondent that "USA Powerlifting referred this matter to USA Weightlifting who is referring this matter to the U.S. Anti-Doping Agency ("USADA") to handle the results management."

21. On June 2, 2016, USADA notified Respondent that the matter was being referred to its Anti- Doping Review Board ("ADRB"). On June 13, 2016, Respondent made his written submissions to the ADRB, contesting USADA's jurisdiction.

22. On July 29, 2016, USADA submitted a response to the ADRB, and offered Respondent an opportunity to submit a reply. Respondent submitted his reply to the ADRB on August 8, 2016.

23. On August 26, 2016, USADA made an additional submission to the ADRB, and offered Respondent an opportunity to submit a reply. Respondent submitted his Sur-Reply on September 14, 2016.

24. On September 23, 2016, the ADRB issued its finding that there was "sufficient evidence of a doping violation to proceed with the adjudication process."

25. On October 3, 2016, USADA formally charged Mr. Dosterschill with an anti-doping rule violation. On October 13, 2016, Respondent requested a hearing and this arbitration process was initiated with the American Arbitration Association ("AAA") on October 14, 2016 pursuant to the Supplemental Procedures.

26. A preliminary hearing was held on December 12, 2016 before Arbitrators Jeffrey G. Benz, Esq., Cameron Myler, Esq. (Chair), and Hon. John Charles Thomas. Appearing at the hearing were Howard Jacobs, Esq. on behalf of Respondent, and Jeff Cook, Esq. and William Bock, Esq. on behalf of Claimant.

27. On December 13, 2016, the Panel issued its procedural Order, bifurcating the case to hear and decide Respondent's challenge to USADA's results management authority prior to any consideration of the merits of the case.

28. On January 19, 2017, Respondent filed his Submission Regarding Lack of Jurisdiction to the Panel and on February 9, 2017, USADA filed its Pre-Hearing Brief on Jurisdiction in opposition to Respondent's submission.

29. On February 16, 2017, the Panel conducted a hearing via teleconference to hear arguments from both parties on Respondent's challenge to USADA's result management authority.

30. On April 7, 2017, the Panel invited the Parties to make an additional submission with respect to "the applicability or inapplicability of the *USADA v. Bruyneel* AAA and CAS decisions . . . on the question of jurisdiction presented here."

31. Both parties submitted their supplemental briefs on Friday, April 14, 2017, and the Panel proceeded to deliberate and render this decision within the time required by the relevant rules.

VII. CONTENTIONS OF THE PARTIES AND THE EVIDENCE

32. References to additional facts and allegations found in the parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it deems necessary to explain its reasoning.

A. Respondent's Contentions

33. Respondent contends, in his pre-hearing submission, at the hearing, and in his supplemental submission that USADA does not have the authority to manage the results of the testing conducted on Respondent's sample, which was collected on March 5, 2016 at the Arnold Weightlifting Championships. Therefore, Respondent argues, the Panel should dismiss the case.

34. First, Respondent argues that the Arnold Weightlifting Championships was an international event, and therefore the IWF was responsible for testing at the event. USA Weightlifting sent an email to Respondent on July 22, 2016, which stated:

> Since your test was an international test under WADA regulation rather than USADA funded, the funding burden for testing falls on the federation and therefore in turn the athlete, as the offending athlete you are fully liable for the costs of said drug positive. The testing agency is irrelevant if the test is done internationally rather than nationally this remains the case. (Ex. M).

35. Second, Respondent argues that in any event, he did not agree to the process that was used here, namely, USAW delegating their alleged testing authority to USA Powerlifting ("USAPL"), who in turn delegated responsibility for sample collection to a third party called Sportcheque.

36. When he registered for the Arnold Weightlifting Championships, Respondent was required to acknowledge a "Drug Testing Agreement," which provided that: "Columbus Weightlifting will be using the United States Anti-Doping Agency's (USADA's) In-Competition Drug Testing Program at the 2016 Arnold Weightlifting Championships." (Ex. B).

37. The "Drug Testing Agreement" also informed competitors that:

> ALL ATHLETES ARE REQUIRED TO REMAIN IN THE WARM UP AREA UNTIL THE END OF THEIR SESSION, INCLUDING THE AWARDS PRESENTATION, UNLESS DISMISSED BY A UNITED STATES ANTI-DOPING AGENCY (USADA) REPRESENTATIVE. (Ex. 6).

38. However, when Respondent was selected for drug testing on March 5, the doping control form used in connection with the collection of his sample was USA Powerlifting's, not the IWF's or USADA's (or even USAW's). The letters "USAWL" were handwritten toward the upper right corner of the doping control form. (Ex. C).

39. Additionally, after Respondent's sample was tested by the WADA-accredited laboratory in Köln, Germany, the Analytical Reports on both Respondent's A Sample and B Sample were sent to Dr. Lawrence Maile, President of USA Powerlifting, at the National Office of USA Powerlifting in Anchorage, Alaska. (Exs. 4, 5). Both of those Analytical Reports list the "International Powerlifting Federation" as the Collection authority. The Analytical Report for the A Sample lists both the sport and discipline of Respondent as "powerlifting" and the Analytical Report for the B Sample lists the sport as "powerlifting" and in the attached "B-sample analysis Verification of sample identity," USAPL is listed as the Federation. *Id*.

40. Respondent argues that because his urine sample was collected by USAPL, and not by USADA, the applicable rules in this matter should be the USAPL Technical Rules, not those of the IWF. (Respondent's Brief, ¶ 4.1).

41. Respondent contends that while USADA claims USAW contracted with USAPL (which then subcontracted with the company Sportcheque) to collect the samples for testing at its event under USAW's authority, there are no written contracts to demonstrate the existence of that alleged arrangement.

42. Respondent also argues:

- If USADA claims that this is a USA Weightlifting sample, and not a USA Powerlifting sample, then the rules of the IWF apply, since the IWF is the International Federation for the sport of Weightlifting. (Respondent's Brief, ¶ 5.3.1).
- The IWF Anti-Doping Policy provides that the IWF, and not USAW (and by designation USADA) have results management authority over international tests. (IWF Anti-Doping Policy, Art. 7.2.)
- In contrast, USADA (through delegation from USAW) would only have results management authority over domestic tests conducted by USAW.

- In its July 22, 2016 letter to Respondent, USAW confirmed that this was an international test, not a domestic test. (Ex. M).

43. With respect to the Panel's request for briefing on the applicability of the *USADA v. Bruyneel* case, Respondent takes the position that in that matter, the AAA panel found USADA had jurisdiction over Johan Bruyneel, who was not a member of USA Cycling, based on two very specific UCI Anti-Doping Rules ("UCI ADR"), under circumstances that simply do not exist in this case. (Respondent's Supplemental Brief, ¶ 1.1).

44. First, Respondent notes, the *Bruyneel* case did not arise from a sample collection, as did this matter. There, the National Anti-Doping Organization ("NADO") that first discovered the alleged anti-doping violation had jurisdiction to initiate and prosecute that violation.

45. Respondent contends that neither the applicable rules of the IWF nor the USADA Protocol provide jurisdiction to USADA based merely on the fact that they were allegedly "the first to discover" the alleged violation. And, in fact, USAPL was the first organization to "discover" the alleged violation in this matter.

46. Second, Respondent argues that the reasoning in *USADA v. Bruyneel* is not applicable because the AAA panel in that case found jurisdiction under another provision of the UCI ADR that gave results management authority to the NADO that discovered the alleged violation *where the alleged offender was not a member of that NADO's federation* (emphasis in original). (Respondent's Supplemental Brief, ¶ 1.3).

47. Respondent confirms that he is in fact "a license holder of USA Weightlifting," and as such, the conclusions of the panel in *USADA v. Bruyneel* regarding Bruyneel are not applicable here, nor is the analysis with respect to the finding of jurisdiction over Dr. Ceyla and Mr. Marti. Unlike Respondent in this case, those individuals were not license holders, and the AAA panel found jurisdiction based on their participation in an event sanctioned by the UCI.

B. USADA's Contentions

48. USADA contends that Respondent has subjected himself to the authority of USADA - and consented to USADA managing the results of his test - by virtue of his membership in USAW and because the sample at issue was collected at an event sanctioned by USAW. As such, USAW has the authority to conduct results management over the sample, and that having referred that authority to USADA, USADA now has results management authority.

49. USADA contends that as a member of USAW, Respondent agreed in USAW's Code of Conduct to "not commit a doping violation as defined by the IOC, WADA, USADA, the USOC or the IWF." (Ex. 3). Additionally, USADA contends that Respondent was notified via the USAW membership website that "[a]ll USAW members are subject to drug testing pursuant to all applicable bylaws, rules, and regulations as well as all United States Anti-Doping Association [sic] guidelines." *Id*.

50. Furthermore, USADA argues that through the language in the "Drug Testing Agreement" ("Columbus Weightlifting will be using the United States Anti-Doping Agency's (USADA's) In-Competition Drug Testing Program at the 2016 Arnold Weightlifting Championships") (Ex. 6), Respondent was notified that he would be subject to drug testing at the event, that he "may call the USADA Hotline at 1-800-233-0393 for any questions about medications and banned substances or practices," and that "[n]ames of athletes who test positive, the name of the substance, and the length of the suspension will be listed on the USA Weightlifting website and on the USADA website." *Id*.

51. Additionally, the "2016 Arnold Weightlifting Championships – Event Information" document (the "Event Information Document") states:

> Drug Testing: It will be announced at the end of your session and you will need to stay in the warm-up area immediately after you are done competing. If you are not announced, you will be free to leave.
>
> If you are selected, you need to go with the drug testing chaperone for drug testing immediately after you are done competing.

> If you are not available for drug testing or leave the drug testing area for any reason if you are announced, you will forfeit your placement and all awards at our competition. In addition, you will be banned at our event if you don't follow the drug chaperone's instructions. (Ex. 7).

52. USADA points out that drug testing procedures were discussed at the meet's technical conference held on March 3. USADA's exhibit in support of this point is a memo written by Marc Cannella and dated April 19, 2016, in which Mr. Cannella explains that "[i]n this meeting [he] announced many topics including drug testing procedures and that WADA would be testing at this event." (Ex. 8).

53. Additionally, the doping control form that Respondent signed includes the following statement: "I declare that I am satisfied with the manner in which sample-taking procedure was carried out," (Ex. 9). Thus, USADA argues, Respondent was notified of USADA's results management authority, he consented to it, and raising no objection to how or who was conducting doping control until after testing positive for multiple prohibited substances.

54. USADA also contends that the IWF is not the proper results management authority. Article 7.2 of the IWF Anti-Doping Policy states that the IWF maintains results management authority over tests that it initiates. (Ex. 10). An August 15, 2016 email sent to USADA by Dr. Magdolna Trombitas, IWF Legal Counsel, states, "[t]he Arnold International was not an[] IWF Event. The IWF Anti-Doping Commission was not in charge of the testing in line with the relevant IWF Rules and Regulations and did not initiate[] or direct[] the doping control at the Event concerned." (Ex. 11).

55. During the hearing, Mr. Cook explained that when providing drug testing services to NGBs and other sports organizations, generally USADA provides all services including selecting athletes for testing, collecting samples (using DCOs who have undergone training provided by USADA), sending samples to the laboratory, and managing the results of any positive tests.

56. Mr. Cook stated that sometimes USADA contracts with third parties to collect samples, but in those instances, USADA always has a written agreement with the third parties. USADA did not provide the Panel with any written contract between USAW and USAPL or between USAPL and Sportcheque with respect to the delegation of responsibility to collect samples at the Arnold Weightlifting Championship.

57. Mr. Cook admitted that this situation, where USAW asked USADA to manage the results of a test only after it received the Analytical Reports from the laboratory, was unusual. USAW's request for USADA to manage the results of the test on Respondent's sample was made via an undated letter from Phil Andrews (Interim Chief Executive Office of USAW) to Jeff Cook. (Ex. 18). That letter stated in pertinent part that:

> *"USA Weightlifting has become aware of the finding of the WADA accredited laboratory in Koln, Germany of an adverse finding [sic]*
>
> *USA Powerlifting conducted this test at a USA Weightlifting sanctioned competition and has formally request [sic] results management to be passed to USA Weightlifting.*
>
> *In turn, USA Weightlifting formally requests that USADA become the results management agency for this Olympic sport athlete, Mr. Kyle Dosterschill."*

58. In its supplemental brief, USADA noted that in *USADA v.* Bruyneel, the AAA panel concluded that it had jurisdiction over Bruyneel, who was a license holder during the relevant period, because the UCI ADR were applicable and the UCI ADR itself stated that it applied to all license holders. In addition, the UCI ADR applied because Bruyneel expressly agreed to be bound by the UCI ADR through the terms of his license agreement and the USADA Protocol applied because the UCI ADR allowed the anti-doping organization that discovered a non-analytical rule violation to apply their own rules.

59. With respect to Dr. Celaya and Mr. Marti, who did not hold UCI licenses, the AAA panel concluded that under the terms of the UCI ADR, their involvement in UCI-sanctioned events was a sufficient basis for the UCI ADR to apply. And because the UCI ADR applied, it followed that the USADA Protocol would also apply for the same reasons that they applied to Bruyneel.

60. As such, USADA contends that in this case the IWF Anti-Doping Policy and the USADA Protocol apply to Respondent. It is uncontested that Respondent was a USA Weightlifting member on March 5, 2016, when his sample, which is the subject of this case, was collected at the Arnold Weightlifting Championships. Under the terms of the IWF Anti-Doping Policy, any athlete who is "a member of any Member Federation" is subject to the IWF Anti-Doping Policy. (Ex. 15 at 6). (USADA's Supplemental Brief, p. 2). USADA argues that Respondent expressly agreed to the IWF Anti-Doping Policy applying because his license agreement states that he agreed not to commit a doping violation as defined by the IWF. (Ex. 3).

61. USADA also argues that the IWF Anti-Doping Policy, similar to the UCI ADR, states that its rules apply to athletes who "participat[e] in such capacity in Events, Competitions and other activities organized, convened, authorized or recognized by IWF, or any Member Federation . . ." (Ex. 15 at 6). It is undisputed that the competition at which Respondent competed was sanctioned by USA Weightlifting, which is a "Member Federation" under the IWF Anti-Doping Policy. Accordingly, for this reason alone Respondent is subject to the IWF Anti-Doping Policy. (USADA's Supplemental Brief, p. 3).

62. Next, USADA contends that the applicability of the USADA Protocol was implied through the Drug Testing Agreement Respondent consented to as part of the Arnold Weightlifting Championships registration materials. The Drug Testing Agreement advised Respondent to obtain information about the doping control process from USADA and to check medications with USADA. (Ex. 6). The agreement also stated that if Respondent were to test positive, the "name[] of the athlete[] who test[s] positive, the name of the substance, and the length of the suspension will be listed on the USA Weightlifting website and on the USADA website." *Id*. USADA concludes that based on this information which points to USADA handling anti-doping efforts for USAW, Respondent consented to the application of the USADA Protocol.

63. USADA bases this conclusion on a similar application of the principle of implied consent recognized by the panel in the AAA Decision, which concluded that by participating in UCI sanctioned events in Europe, Dr. Celaya and Mr. Marti consented not only to the UCI ADR but also to the USADA Protocol, which was not contained in or directly referenced by the UCI ADR. *Id.* (quoting PO #2 ¶¶ 40, 46 ("It can also be assumed that a participant in a sport acknowledges the regulations of an association known to him if he requests a general starting or playing permit from the association." *Swiss Fed. Ct. Roberts v. FIBA*, Feb. 7, 2001)).

64. Furthermore, USADA submits that the IWF is not the appropriate entity to manage the results of the tests conducted on Respondent's sample. Article 7 of the IWF Anti-Doping Policy addresses the results management authority ("RMA") of the IWF and states that its authority "shall be determined by reference to and in accordance with Article 7 of the Code." (Ex. 10). In turn, Article 7 of the Code states that the applicable rules are those of "the Anti-Doping Organization that initiated and directed Sample collection." (Ex. 16). Because USA Weightlifting initiated and directed the test (Ex. 1), and USAW referred results management to USADA (Ex. 18), it is the USADA Protocol that should apply.

65. Finally, USADA argues that under Article 7 of the Code, the international federation is "the Anti-Doping Organization of last resort" "where the rules of a [NADO] do not give the [NADO] authority over an Athlete or other Person who is not a national, resident, license holder, or member of a sport organization of that country . . . ." (Ex. 16, Art. 7.1.1 and Comment to Art. 7.1.1). Here, it would not make sense for the IWF to have RMA because Respondent falls squarely within the authority of the USADA Protocol, is a U.S. athlete, does not compete at the international level, the event at which he was tested was not an international event and not sanctioned by the IWF, and the IWF did not initiate or direct the test. Under these circumstances, Article 7 of the IWF Anti-Doping Policy only vests RMA with the IWF for tests it initiates, (Ex. 10), and as stated in USADA's Pre-Hearing Brief, the IWF has rejected results management authority because it did not initiate the test and because Respondent is not an international-level athlete. (Ex. 11).

VIII. Analysis

66. At its heart, the basis of arbitral jurisdiction is consent; this is black letter law. In sport, consent is not necessarily obtained through the negotiated back and forth between parties that are found in commercial proceedings. There are several well-recognized methods by which athletes are deemed to consent to the arbitration of their doping disputes. Athletes can agree expressly on their membership applications or entry forms to the process to resolve disputes with the governing body(ies) of their sport. In addition, athletes can also be subject to arbitral jurisdiction by their act of affirmative participation in an event or under the auspices of a sporting organization, where the relevant rules say that athletes are subject to anti-doping procedures with attendant arbitration mechanisms; basic rules of private associations mandate this result.

67. Important to the analysis of this issue is, to paraphrase a well-known line related to the investigation of a famous public figure: "What did he know and when did he know it?" The fundamental question here is whether Respondent has agreed, through one of the mechanisms just mentioned, to subject himself to arbitrate any alleged violations of the anti-doping rules. We find that on one basis the answer is no, but that on another basis the answer is yes, but just barely yes.

A. Respondent's Membership in USAW

68. The first question considered by the Panel was whether Respondent subjected himself to the results management authority of USADA in this situation as a result of having signed the USAW Membership Form and becoming a member of USAW.

69. USADA provided as Exhibit 3 a screenshot of the USAW Membership Form, which Respondent completed on February 27, 2016. Respondent also confirmed in his written submissions that he "*is* a license holder of USA Weightlifting." (Respondent's Supplemental Brief, ¶ 1.3.1) (emphasis in original).

70. Article 3 of the USADA Protocol (Athletes Subject to Testing by USADA and the USADA Protocol) provides that

> The USOC, NGBs, other sports organizations and the Code authorize USADA to test, investigate and conduct other anti-doping activities concerning . . . ***[a]ny Athlete who is a member or license holder of a NGB*** . . . (Ex. 19) (emphasis added).

71. By signing the USAW Membership Form, Respondent agreed that he would: "[a]bide by all USA Weightlifting & International Weightlifting Federation rules, selection procedures and safety guidelines."

i. Agreement to Abide by USAW's Rules

72. The "rules" listed on the USAW website include the following: Bylaws, Board Member Guidelines, Potential Conflict of Interest Disclosure, Statement of Principles and Conflict of Interest, International Weightlifting Federation Technical Rules, the USA Weightlifting Addendum to International Weightlifting Federation ethical Rules, and the USA Weightlifting Code of Ethics. (See http://www.teamusa.org/USA-Weightlifting/About-Us/Governance-and-Financial/Bylaws-Technical-Rules-and-Policies).

73. There is no language in any of these rules that informs Respondent that he is subject to the terms of USADA Protocol, the USOC Policy, or even that any dispute relating to an alleged anti-doping rule violation would be adjudicated through arbitration.

74. Furthermore, USADA's argument that language on the pages of the USAW website relating to anti-doping also constitutes "rules" that bind Respondent is unpersuasive.

75. The Panel acknowledges that there are pages on the USAW website that set forth USAW's commitment to anti-doping ("USA Weightlifting is opposed to the practice of doping in sport and fully supports and complies with the policies, protocols, and rules set forth by the U.S. Anti-Doping Agency (USADA) as the independent, non-profit anti-doping organization in the U.S." (http://www.teamusa.org/usa-weightlifting/weightlifting101/no-drugs)), that describe USAW's new "Lift Clean" program that commenced on January 1, 2017 (http://www.teamusa.org/USA-Weightlifting/Weightlifting101/No-Drugs/Lift-Clean), and that provide information about which entities are responsible for conducting drug testing at International, National and Local events (http://www.teamusa.org/USA-Weightlifting/Weightlifting101/No-Drugs/Who-Gets-Tested). There are also links to USADA's website: "Anti-Doping 101" (http://www.usada.org/athletes/antidoping101) and "Supplement 411" (http://www.usada.org/substances/supplement-411).

76. However, these pages are accessible to anyone who visits the USAW website, are for informational purposes, are not part of the process by which an athlete becomes a member of USAW on the NGB's website, and do not constitute part of the USAW Membership Form that Respondent signed. *See Croatian Golf Federation v. Croatian Olympic Committee,* CAS 2012/A/2813 (finding that the publication of information about arbitration on the website of the Croatian Olympic Committee ("COC") "was intended for general information purposes" and "that no express declaration of intent to arbitrate at CAS in any and all disputes could be inferred from the content of the website, which should be interpreted as to generally inform the reader of the website about the COC's Sports Arbitration and not as an offer in good faith to conclude a binding arbitration agreement.")

77. In order for Respondent to even locate the language that states "USADA is able to test and adjudicate anti-doping rule violations for any athlete who . . . is a member or a license holder of a [USOC] recognized sport [NGB]" or "is participating at an event or competition sanctioned by the USOC or a USOC-recognized sport NGB," Respondent would need to know that he had to go to the USAW website, click on the "Athlete" link on the menu, select the "Anti-Doping" link on the submenu, and then click on "Anti-Doping 101," which would direct him to USADA's website. Such an attenuated connection cannot be deemed to subject Respondent to the results management authority of USADA in this case. There is simply no way to demonstrate that any modicum of consent to arbitration under the USADA Protocol is given by these frankly insufficient statements of generality.

78. The Panel also rejects USADA's argument that Respondent should be subject to USADA's results management authority as a result of language on the "Membership" page of the USAW website (http://www.teamusa.org/usa-weightlifting/membership) that states:

> NOTICE: All USAW members are subject to drug testing pursuant to all applicable USAW bylaws, rules, and regulations as well as all United States Anti-Doping Agency guidelines. All members are expected to abide by the Member Code of Conduct. (Ex. 3)

79. This "notice" is accessible through one of many pages under the "Membership" link on the USAW website. Again, it is not necessary to click through this page when becoming a member of USAW and cannot not be deemed part of the "USAW rules" that Respondent agreed to abide by when he completed the USAW Membership Form. NGBs must do a better job in this area than was done by USAW here; athletes should not have to divine from general statements and polemics that they are subject to arbitration when the rules and membership application could and should simply and easily state as much.

80. The current case is distinguishable from *USADA v. Bruyneel, et al* (AAA Case Nos. 77 190 00225/00226/00229 12). There, the AAA panel found that through the language in the UCI license application and the language on the license granted to Mr. Bruyneel by his national federation in Belgium confirmed his "express consent to the rules and regulations of the UCI, including the UCI ADR." (*USADA v. Bruyneel*, ¶ 18).

81. Language on the license issued by Mr. Bruyneel's national federation informed him that as a condition of participation in cycling, he agreed not only to anti-doping rules, but also to arbitrate disputes arising from alleged violations of those rules:

> The holder is subject to the regulations of the UCI and the national and regional federations, and accepts the anti-doping controls and blood tests specified therein and the exclusive jurisdiction of the [Court of Arbitration for Sport.] *USADA v. Bruyneel* (*Id. at* ¶ 16).

82. Here, no such language exists in the USAW Registration Form and Respondent has not agreed – by virtue of signing that form – to be subject to the USADA Protocol or to resolve any alleged anti-doping rule violations by means of arbitration.

ii. Agreement to Abide by the IWF's Rules

83. Additionally, by signing the USAW Membership Form, Respondent agreed to be bound by the rules of the IWF, which include its Anti-Doping Policy. The section called the "Scope of These Anti-Doping Rules" specifies that:

> These Anti-Doping Rules shall apply to IWF and to each of its Member Federations. They also apply to the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, as a condition of his/her membership, accreditation and/or participation in the sport, ***to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of IWF to enforce these Anti-Doping Rules and to the jurisdiction of the hearing panels specified in Article 8, Article 7.10 and Article 13 to hear and determine cases and appeals brought under these Anti-Doping Rules***:
>
> a. all Athletes and Athlete Support Personnel who are members of any Member Federation, or of any member or affiliate organization of any Member Federation (including any clubs, teams, associations or leagues);
>
> b. all Athletes and Athlete Support Personnel participating in such capacity in Events, Competitions and other activities organized, convened, authorized or recognized by IWF, or any Member Federation, or any member or affiliate organization of any Member Federation (including any clubs, teams, associations or leagues), wherever held . . . (emphasis added).

84. While Respondent agreed to "be bound by [the IWF's] Anti-Doping Rules," those rules do not subject him to the results management authority of USADA. Pursuant to the "Scope of [the IWF's] Anti-Doping Rules," Respondent agreed to "submit[] to the authority of the IWF" to enforce its rules and to "the jurisdiction of panels specified in Article 8, Article 7.20 and Article 13." Article 7.10 (Resolution Without a Hearing) addresses circumstances under which an athlete and the IWF may agree on a sanction, and the athlete's right to waive a hearing. Article 8 (Right to a Fair Hearing) addressed the requirements of a hearing when a case is referred to the IWF Doping Hearing Panel for adjudication. Finally, Article 13 sets forth the rules relating to appeals. None of these Articles of the IWF Anti-Doping Policy subject Respondent to the results management authority of USADA.

iii. Agreement not to Engage in Other Conduct

85. When Respondent signed the USAW Membership Form, he also agreed that he would *not*:

- "sell or distribute any substance on the World Anti-Doping Agency (WADA) list of banned substances . . .;
- use illegal drugs in the presence of teammates, athletes, coaches, officials, volunteers, spectators, sponsors and staff of USA Weightlifting and/or at any USA Weightlifting event or activity . . . ;[or]
- commit a doping violation as defined by the International Olympic Committee (IOC), World Anti-Doping Agency (WADA), the United States Anti-Doping Agency (USADA), the United States Olympic Committee (USOC) or the International Weightlifting Federation (IWF)." (Ex. 3)

86. However, none of this language in the USAW Membership Form subjects Respondent to the results management authority of USADA in this case. There is no reference to the USADA Protocol or the USOC Policy. These rules are not incorporated by reference in the USAW Membership Form and it cannot be assumed that Respondent is able to intuit his obligations from this incomplete and poorly drafted document.

87. The Panel notes that Section 14.2 of the USOC Policy states that "[a]ll Athletes . . . by virtue of their membership in an NGB" or by "participation in an Event or Competition organized or sanctioned by an NGB . . . agree to be bound by this Policy and by the USADA Protocol."

88. However, in order to be bound by the USOC Policy, athletes must actually be informed of the requirement. Section 14.1 of the USOC Policy acknowledges that:

> [t]he Code requires that each Signatory [must] establish rules and procedures to ensure that all Athletes . . . under the authority of the Signatory and its member organizations are informed of, and agree to be bound by, anti-doping rules in force of the relevant anti-doping organizations. ***To implement this requirement, each NGB . . . shall be responsible for informing Athletes . . . in its sport of this USOC National Anti-Doping Policy and of the USADA Protocol.*** (emphasis added).

89. Here, the USOC is a signatory to the Code (*see* USOC Policy, Section 3; *see also* https://www.wada-ama.org/en/code-signatories) and USAW, as the NGB for the sport of weightlifting in the United States, is a member organization of the USOC. The USOC was required to establish rules and procedures to ensure that *all athletes* under its and USAW's authority were informed of and agreed to be bound by the USOC Policy and the USADA Protocol. In order to implement this requirement, USAW, as the NGB for weightlifting, "shall be responsible for informing [a]thletes" about the USOC Policy and the USADA Protocol. USAW failed to meet this obligation.

90. Accordingly, the Panel finds that the membership argument does not assist USADA and in fact, after undertaking an in-depth review, the Panel is of the view that the USAW Membership Form is devoid of any language that would indicate Respondent's acceptance of arbitral jurisdiction. The Panel is hopeful that the USOC and USAW will undertake a review of their relevant rules and membership application forms to ensure that all athletes in the USAW system are clearly on notice that by becoming a member of USAW they are subject to the USADA Protocol and to arbitral jurisdiction.

91. In summary, the Panel finds that Respondent was not adequately informed by USAW about the USOC Policy or the USADA Protocol in the USAW Membership Form and is not subject to the results management authority of USADA in this case by virtue of signing that document.

B. Respondent's Participation in the Arnold Weightlifting Championship

92. The Panel next considers whether Respondent is subject to USADA's results management authority by virtue of competing in the Arnold Weightlifting Championships, an event sanctioned by USAW, the NGB for the sport of weightlifting in the United States.

93. Article 3 of the USADA Protocol (Athletes Subject to Testing by USADA and the USADA Protocol) provides that:

> The USOC, NGBs, other sports organizations and the Code authorize USADA to test, investigate and conduct other anti-doping activities concerning . . .: [a]ny Athlete ***by virtue of participation in (including registration for) an Event or Competition in the United States or which is organized or sanctioned by the USOC or NGB***. (Ex. 19) (emphasis added).

i. Respondent Agreed to be Drug Tested

94. The parties do not dispute that the Registration Form Respondent signed when registering for the Arnold Weightlifting Championships included a section called "Drug Testing Agreement," which included the following language:

> ***Columbus Weightlifting will be using the United States Anti-Doping Agency's (USADA's) In-Competition Drug Testing Program*** at the 2016 Arnold Weightlifting Championships. A positive result for an IOC-prohibited substance will be cause for disqualification from this event and loss of eligibility. . . . (emphasis added).
>
> By registering to compete at this occasion, ***you are consenting to be subject to drug testing on your urine*** and accept the penalties if found positive for a prohibited substance. All athletes are subject to drug testing and, if chosen for drug testing, are required to provide an acceptable specimen. Cooperation is mandatory; noncompliance, including but not limited to the failure to appear for drug testing, will be cause for the same penalties as a positive drug test (emphasis added).

> ***I understand that drug testing will be conducted on a formal basis for athletes weighed-in for this event*** or program and that the detection of use of banned drugs would make me subject to suspension by my sport's National Governing Body and USOC. ***By registering for this event. I agree to be subject to a drug test*** and its penalties is declared positive for a banned substance (emphasis added).
>
> I also understand that if for some reason I elect not to continue in the competition to the completion of an official total, or so not total, that ***I will still be eligible for drug testing***, and I will report to the Doping Control Officer and advise him/her that I am making myself available for drug testing. I will not leave the warm up area until excused by the Doping Control Officer. (Ex. 7) (emphasis added).

95. Additionally, the Event Information Document stated:

> **Drug Testing: It will be announced at the end of your session and you will need to stay in the warm-up area immediately after you are done competing. . . . If you are selected, you need to go with the drug testing chaperone for drug testing immediately after you are done competing** (bold in original).(Ex. 7).

96. The Event Information Document also informed participants that:

> Any changes to the Arnold Weightlifting Championships information will be addressed at the Technical Conference. Anyone who does not attend the Technical Conference agrees to accept all decisions made therein. . . *Id.*

97. In a memorandum dated "4/19/16" and titled "Technical Conference at the Arnold 2016." [*sic*], Mr. Cannella stated that "[i]n this meeting [he] announced many topics including drug testing procedures and that WADA would be testing at this event." (Ex. 8).

98. Respondent was informed in the Registration Form for the Arnold Weightlifting Championships and in the Event Information Document that he would be subject to drug testing at the event. It was also announced at the Technical Conference that athletes would be subject to drug testing.

99. There can be no dispute that Respondent agreed to subject himself to drug testing at the Arnold Weightlifting Championships.

ii. Notice to Respondent About USADA

100. The only remaining question for the Panel is whether, by virtue of registering for and competing in the Arnold Weightlifting Championships, Respondent agreed to have the results of the testing on his sample managed by USADA.

101. There is no explicit reference to the USADA Protocol in the Registration Form. However, USAW expressly informed Respondent that USADA would be involved in the testing process by stating on the form that: "Columbus Weightlifting will be using the United States Anti-Doping Agency's (USADA's) In-Competition Drug Testing Program at the 2016 Arnold Weightlifting Championships." (Ex. 6).

102. Respondent was also informed via an announcement at the Technical Conference that "WADA would be testing at this event." (Ex. 8).

103. The consequences of an anti-doping rule violation were communicated to Respondent in the Registration Form and Event Information Document as follows:

- "A positive result for an IOC-prohibited substance will be cause for disqualification from this event and loss of eligibility. . . ." (Ex. 6);
- "[T]he detection of use of banned drugs would make me subject to suspension by my sport's National Governing Body and USOC." *Id.*;
- "[T]he practice of blood doping is banned by the [*sic*] USA Weightlifting, the USOC, the IWF and the IOC and that to do so would make me subject to punitive action within existing policies." *Id.*;
- "Names of athletes who test positive, the name of the substance, and the length of suspension will be listed on the USA Weightlifting website and on the USADA website." *Id.*;
- "If you are not available for drug testing or leave the area for any reason if you are announced, you will forfeit your placement and all awards at our competition. In addition, you will be banned at our event if you don't follow the drug chaperone's instructions." (Ex. 7).

104. While USADA was listed as an entity that Respondent could contact with questions, it was not the only one. Respondent received a variety of conflicting instructions at the event via the Registration Form and the Event Information Document. He could contact:

- "[T]he U.S. Anti-Doping Agency and its Drug Reference Line (1-800-233-0393)" about "the doping control process, the protection of [his] rights, and the status of specific medications" (Ex. 6);
- "[T]he USADA Hotline at 1-800-233-0393 for any questions about medications and named substances or practices" *Id.*;
- The "National Weightlifting Office at 1-719-866-4508 for specific suspension policies" *Id.*; or
- "Marc Canella by email or phone at (614) 832-2757" for ". . . drug-testing [*sic*] and related items." (Ex. 7).

105. There were also conflicting instructions with respect to what was required of Respondent after he was finished competing:

- He should stay in the warm-up area until dismissed by a USADA representative ("ALL ATHLETES ARE REQUIRED TO REMAIN IN THE WARM UP AREA UNTIL THE END OF THEIR SESSION, INCLUDING THE AWARDS PRESENTATION, UNLESS DISMISSED BY A UNITED STATES ANTI-DOPING AGENCY (USADA) REPRESENTATIVE" (Ex. 6));
- That he should stay in the warm-up area until dismissed by a DCO ("I will not leave the warm up area until excused by the Doping Control Officer.") *Id.*;
- Or that he was free to leave the area if his name wasn't called ("**Drug Testing: It will be announced at the end of your session and you will need to stay in the warm-up area immediately after you are done competing. If you are not announced, you will be free to leave"** (Ex. 7).(bold in original).

106. There is no question that the Registration Form for the 2016 Arnold Weightlifting Championships could have been – but was not – drafted in a manner that clearly communicated to athletes participating in this event that they were subject to the USADA Protocol and the USOC Policy, and that any alleged anti-doping rule violations would be adjudicated through arbitration. Again, the Panel urges USAW to examine event registration forms used in USAW-sanctioned events so as to ensure that all athletes in the USAW system are clearly on notice that by participating in USAW-sanctioned events they are subject to the USADA Protocol, the USOC Policy, and arbitral jurisdiction.

107. While the terms relating to doping control in the Registration Form and the Event Information Document were unartful, incomplete, and often conflicting, the multitude of these notifications and statements made clear, or should have made clear, to the Respondent that he was subject to anti-doping controls, which included arbitration as the procedural remedy and outcome. It is simply beyond belief that an elite athlete in any sport – but particularly one in a strength sport – could be unaware of the anti-doping obligations that arise from participating in events sanctioned by the NGB of the athlete's sport, or not know that they would be subject to testing and adjudication in connection with the relevant standards.

iii. USAW Initiated and Directed the Doping Control Process

108. Mark Cannella, the Event Director of the 2016 Arnold Weightlifting Championships, stated in his affidavit that "[i]n 2016, the Arnold Weightlifting Championships was a USA Weightlifting sanctioned [*sic*] event" and that as the sole Event Director he was "in charge of, among other things, . . . setting up doping control." (Ex. 1, ¶7).

109. Mr. Canella, pursuant to the authority of USAW, selected Respondent for drug testing based on Respondent's second place finish in the 94 kg class at the competition. He then delegated the remainder of the anti-doping control process to USA Powerlifting, which was also holding a competition at the Arnold Sports Festival.

110. Mr. Canella explained that because

> [he had] good working relationships with the individuals who [ran] the USA Powerlifting event, and in an effort to be cost-efficient [he] arranged for USA Powerlifting to handle the doping control for the Arnold Weightlifting Championship. USA Powerlifting informed [him] that they would contract with Sportcheque, which is run by DCO Jack Marcus, to collect the samples for testing. (Ex. 1, ¶ 9).

111. While USADA produced no written agreements between USAW and USAPL or between USAPL and Sportcheque, the ISTI does not require a written agreement when delegating the authority to collect samples.

112. The ISTI defines "Testing Authority" and "Sample Collection Authority" as follows:

> **Testing Authority**: The organisation that has authorized a particular Sample collection, whether (1) an Anti-Doping Organization (for example, the International Olympic Committee or other Major Event Organization, WADA, an International Federation, or a National Anti-Doping Organization); or (2) ***another organization conducting Testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization (for example, a National Federation that is a member of an International Federation).*** (emphasis added).
>
> **Sample Collection Authority**: The organisation that is responsible for the collection of Samples in compliance with the requirements of the International Standard for Testing and Investigations, whether (1) the Testing Authority itself; or (2) ***another organization (for example, a third party contractor) to whom the Testing Authority has delegated or subcontracted such responsibility (provided that the Testing Authority always remains ultimately responsible under the Code for compliance with the requirements of the International Standard for Testing and Investigations relating to collection of Samples)***. (emphasis added).

113. In this case, USAW, as the "Testing Authority," delegated the responsibility to USAPL (as the "Sample Collection Authority"), which then used a third-party DCO to collect the sample from Respondent at the Arnold Weightlifting Championships.

114. Jack Marcus, the owner of Sportcheque, collected Respondent's sample and explained that "either [he] or one of his chaperones marked 'USAWL' on the doping control form to make clear that USA[W] provided him with the authority to collect the sample." (Ex. 2). Mr. Marcus stated in his affidavit that "[a]t the end of the event, [he] sent the sample collection kits [he] had collected by overnight mail to the WADA-accredited laboratory in Cologne, Germany." *Id.*

115. The laboratory sent the Analytical Reports to the President of USAPL, at the organization's National Office in Anchorage, Alaska. (Exs. 4, 5). USAPL then notified USAW of the results of the testing performed on Respondent's sample.

116. Subsequently, Phil Andrews (Interim Chief Executive Office of USAW) sent a letter to Jeff Cook at USADA, informing USADA that:

> USA Weightlifting has become aware of the finding of the WADA accredited laboratory in Koln, Germany of an adverse finding [sic]
>
> USA Powerlifting conducted this test at a USA Weightlifting sanctioned competition and has formally request [sic] results management to be passed to USA Weightlifting.

> In turn, USA Weightlifting formally requests that USADA become the results management agency for this Olympic sport athlete, Mr. Kyle Dosterschill. (Ex. 18)

117. Article 7.1 (Responsibility for Conducting Results Management) of the IWF's Anti-Doping Policy only addresses the circumstances under which the IWF shall take responsibility for results management:

> 7.1.1 The circumstances in which IWF shall take responsibility for conducting results management in respect of anti-doping rule violations involving Athletes and other Persons under its jurisdiction shall be determined by reference to and in accordance with Article 7 of the Code.

118. However, Article 7.1 of the Code (Responsibility for Conducting Results Management) provides that:

> Except as provided in Articles 7.1.1 and 7.1.2 below, ***results management and hearings shall be the responsibility of, and shall be governed by, the procedural rules of the Anti-Doping Organization that initiated and directed Sample collection***. (emphasis added).

119. Here, USAW was the organization that initiated the drug testing process, delegated sample collection to USAPL, and, when it received the results of the testing on Respondent's sample, asked USADA to manage the results of such testing.

120. Although the Panel finds that USADA has results management authority in this instance, we note that USADA has barely met its burden of proof of doing so to the Panel's comfortable satisfaction in this regard. While this sentence and its following progeny is *obiter dicta*, the Panel is of the view that United States athletes would be better served by having clear documentation implemented at each event sanctioned by an NGB and in the NGB membership application process that informs all athletes of the legal obligations they have and their rights to resolve any disputes arising thereunder; whether this responsibility lies with WADA, the IWF, the USOC, USAW, or USADA is something that is outside of this Panel's purview.

121. However, whichever organizations are ultimately responsible, something needs to be done to ensure that athletes are put on fair and open notice of their obligations without the need to engage in the variation of legal gymnastics that had to occur here because of frankly completely unnecessary and easily curable documentary flaws.

C. Cost of the Testing on Respondent's Sample

122. The Panel's finding that USADA has results management authority with respect to Respondent's sample raises an issue that was briefly addressed by the parties in their submissions on jurisdiction, and that the Panel deems appropriate to address in the context of this Award: responsibility for the costs of the testing conducted on Respondent's sample.

123. In an email dated July 19, 2016, the Finance Manager at USAW, Sandra Bowen, requested that Respondent pay USAW $6,245.82, for costs presumably related to the testing and analysis of Respondent's sample, though USAW's Invoice No. 1072 provided no details with respect to how that amount was calculated. (Respondent's Brief at ¶ 5.3.4; Ex. M). Respondent asked Ms. Bowen:

> *"Can you please explain why I am responsible for this testing cost? Is it because this test was not conducted by USADA and was not conducted pursuant to the USADA Protocol?"* (Ex. M).

124. Ms. Bowen asked Phil Andrews, the Chief Executive Officer of USAW, if he could answer Respondent's question. In an email to Respondent dated July 22, 2016, Mr. Andrews responded as follows:

> "*Since your test was an international test under WADA regulations rather than USADA funded, the funding burden for testing falls on the federation and therefore in turn the athlete, as the offending athlete* [sic] *you are fully liable for the costs of said drug positive.*
>
> *The testing agency is irrelevant if the test is done internationally rather than nationally* [sic] *this remains the case.*
>
> *Should after the legal process is complete you be found* [sic] *that there was no doping rule violation then the charges will be waived at that stage." Id.*

125. Although Respondent consented to be drug tested at the Arnold Weightlifting Championships, he did not consent to pay for the costs associated with the testing and analysis of his sample. There is nothing in the Registration Form that informed Respondent that, if selected for drug testing, he would be responsible for any such costs. Nor did Respondent consent to pay for such costs as a result of completing the USAW Membership Form.

126. Additionally, as set forth in Article 5.3.5 of the IWF Anti-Doping Policy:

> ***The overall costs of Testing and Sample analysis is the responsibility of*** the organizing committee and/or ***the Member Federation of the country in which the Competition or Event is taking place***. IWF may at its own discretion decide to take responsibility for those costs. (emphasis added)

127. Pursuant to R-40 (Scope of Award) of the Supplemental Procedures:

> The [Panel] may grant any remedy or relief that [it] deems just and equitable and within the scope of the World Anti-Doping Code, International Federation Rules, the USADA Protocol or the USOC Anti-Doping Policies.

128. Here, the IWF Anti-Doping Policy (rules of the international federation of weightlifting) clearly states that the "Member Federation" (USAW, as the NGB for weightlifting in the United States) is responsible for "[t]he overall costs of Testing and Sample analysis." As defined by the Code, Testing is "[t]he parts of the Doping Control process involving test distribution planning, Sample collection, Sample handling, and Sample transport to the laboratory" and "Sample analysis," though not defined in the Code, surely encompasses any testing conducted by the laboratory on Respondent's sample.

129. Since the USAW is not a party to this proceeding, the Panel's ruling on this issue relates solely to Respondent's obligations: Respondent has no responsibility to pay for costs arising from any testing or analysis on his sample that was collected at the 2016 Arnold Weightlifting Championships.

130. Furthermore, to the extent any portion of the amount in USAW's Invoice No. 1072 ($6245.82) is related to the "administrative costs" associated with the "Testing or management" of Respondent's sample, all such costs shall be borne by USADA, as required by paragraph 17(c) of the USADA Protocol:

> ***"All administrative costs of USADA relating to the Testing and management of Athletes' Samples prior to a determination of Ineligibility will be borne by USADA.*** Administrative costs of the USADA adjudication process (AAA filing fee, AAA administrative costs, AAA arbitrator fees and costs) will be borne by the USOC." (emphasis added).

IX. Decision

131. For all of the foregoing reasons, the Panel hereby rules that USADA has the authority to manage the results of the testing conducted on Respondent's sample that was collected at the 2016 Arnold Weightlifting Championships. Accordingly, arbitral jurisdiction is proper here.

132. The Panel also rules that Respondent shall not be responsible for any costs related to the testing or analysis conducted on his sample (USAW Invoice No. 1072 for $6245.82), and that USADA shall bear any administrative costs related to the testing or management of Respondent's sample.

133. As a result of this ruling, the Panel orders the parties to proceed to share their dates of availability over the next 30 days for the Panel to conduct a proper preliminary hearing to set a hearing date and the procedural order for the case.

Dated: May 10, 2017

Cameron Myler
Chair

Jeffrey Benz
Arbitrator

Hon. John Charles Thomas (Ret.)
Arbitrator

AMERICAN ARBITRATION ASSOCIATION®

Commencing an Arbitration for Olympic Movement and Sport Doping Disputes

Initiating Arbitration for Olympic Movement Disputes

1. Complete the *Demand for Arbitration* form.
2. Send the completed Demand form with the appropriate fee (see #3, below) to:

Western Case Management Center
45 E River Park Place W, Suite 308
Fresno, CA 93720
Attn: Jennifer Nilmeier

You may also file online.

3. The filing fee for cases that proceed before a single arbitrator is $850. The filing fee for a three-person arbitration panel is $1,000. These fees can be paid by credit card or check.
   [Note: these sums are separate from the arbitrator(s) charges, which are usually split equally between the parties.]

Initiating an Emergency Arbitration for Olympic Movement Disputes*

1. Complete the *Demand for Arbitration* form.
2. Fax the Demand form to (559) 490-1919.
3. Immediately call the Western Case Management Center in Fresno, CA at (877) 528-0880 (toll free). Ask to speak to Jennifer Nilmeier or Jeff Garcia (in that order). Normal business hours are 8:00 AM-5:30 PM, PT.
4. Submit the appropriate fee via credit card or check. Your case manager will handle credit card payments.

** Note: Emergency Arbitrations are defined as those in which a hearing is needed within 24 to 48 hours due to an upcoming qualifying event. These hearings may be held in person or via telephone.*

Initiating Olympic Sport Doping Disputes

Pursuant to the *American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, arbitration proceedings shall be initiated by USADA by sending a notice to the athlete or other person charged with an anti-doping violation and the Administrator. For additional information, please review the *AAA Supplementary Procedures for the Arbitration of Olympic Sports Doping Disputes*.

American Arbitration Association®

Frequently Asked Questions for Olympic Movement Disputes

Administered by the American Arbitration Association® (AAA®)

Q: What is the American Arbitration Association?

A: The American Arbitration Association (AAA) is a not-for-profit public service organization founded in1926, committed to the resolution of disputes through the use of arbitration, mediation and other forms of alternative dispute resolution. Named as the administrator of arbitrations and mediations arising out of countless contracts, agreements, legislative acts and other related documents, our primary mission is one of service and education. The AAA website is **www.adr.org**.

Q: Why is AAA involved in Olympic disputes?

A: The AAA currently is named as the administrative agency in the Ted Stevens Olympic and Amateur Sports Act. Additionally, the AAA is named as administrator of athlete disputes under the USOC's Constitution and Bylaws. Separately, the AAA is the named administrator for disputes arising out of the US Anti-Doping Agency's procedures.

Q: Are there rules that govern AAA's administration of Olympic disputes?

A: The USOC's Constitution and Bylaws name the AAA Commercial Arbitration Rules. A copy of these Rules can be downloaded from the AAA website, as can separate rules for anti-doping grievances.

Q: Does an athlete need an attorney to go through arbitration?

A: You are not required to have an attorney. However, depending on the nature of your claim, it might be wise to consult with one.

Q: How much does it cost to go through arbitration?

A: The filing fee is $850 for cases that proceed before a single arbitrator and $1,000 for cases that proceed before a three-person arbitration panel. This amount is to be paid when you file a case with the AAA. Whether you pay the fee upfront or later, it is an obligation and the fee must be paid. Both the athlete and the national governing body (NGB) equally split the arbitrator's fee. Arbitrators' fees vary from arbitrator to arbitrator. Fees typically range from $1,500 per day to upwards of $2,000 per day. These amounts can be paid by credit card or check.

Q: Who is eligible to go through the Olympic Movement Disputes arbitration process?

A: The Ted Stevens Olympic and Amateur Sports Act states that any "amateur athlete, coach, trainer, manager, administrator or official" can avail themselves of the arbitration process concerning the right to compete in athletic competition.

Q: Where do I file a request for arbitration?

A: You can file a Demand for Arbitration with any one of the AAA offices. To expedite the process, you can file the case directly with the AAA Western Case Management Center in Fresno, California. The Center has been designated as the AAA National Olympic caseload office. Demand for Arbitration forms can be downloaded from AAA website.

Q: What happens after I file a Demand for Arbitration?

A: The case is assigned to a dedicated AAA case manager who will serve as the point of contact throughout the process scheduling hearings, coordinating the exchange of documents, etc., until the case is closed. *The AAA Commercial Arbitration Rules* explain the process in detail. (Note: Article IX of the USOC Constitution allows the AAA wide latitude to expedite a case in a manner it sees fit when the dispute must be resolved quickly.)

Q: Is the AAA affiliated in any way with the USOC?

A: The AAA is not affiliated with the USOC nor receives funding of any kind from it. The AAA is a completely neutral organization and provides administrative services for the USOC, as it does for thousands of companies and organizations every year.

Q: Your Rules reference arbitrators. Who are the AAA's arbitrators?

A: The AAA maintains a panel of independent and impartial arbitrators and mediators. The AAA's arbitrators are not employees of the AAA, but rather serve as impartial decision makers (collectively referred to as "neutrals") on disputes when they are asked to do so. All neutrals are required, before accepting appointment, to assess whether they have any conflicts of interests with either party, their attorneys, or others similarly involved in the dispute. Any dealing, no matter how minor, will be disclosed to the parties prior to the arbitrator accepting appointment.

Q: Can I go to court if I am dissatisfied with the ruling from the arbitrator?

A: Because arbitration is a final and binding process, once the arbitrator's award is issued, any right to appeal that decision in court is extremely limited. Whether a particular court would choose to review an arbitration award would depend on the court itself.

Q: What if my particular National Governing Body (NGB) has an informal dispute resolution process. Should I go through that process before going to arbitration?

A: You must check with your NGB. Some NGBs require you to go through their designated process prior to submitting your dispute to arbitration.

Q: Can I request the arbitration hearing be held in my city?

A: If the parties cannot agree upon a mutually acceptable locale for the hearing, the Rules empower the AAA to determine the site of the hearing.

Q: Are hearings ever held by telephone?

A: Hearings can be held by telephone as a way to expedite the process.

Q: How quickly can an arbitration hearing be scheduled?

A: In several instances, the AAA had extremely time-sensitive cases filed and scheduled a hearing within a few hours. If an immediate hearing is necessary because of an upcoming qualifying event, the AAA will work to bring the case to hearing as quickly as possible. Other non-expedited matters can be resolved within a matter of weeks or months, if not sooner.

Q: Who can I contact at AAA if I need further information about filing a case?

A: You can contact Jennifer Nilmeier at (559) 490-1862.

AMERICAN ARBITRATION ASSOCIATION®

Olympic Athlete Eligibility, NGB Determination, and Doping Disputes: An Overview

Introduction

The AAA® is widely recognized for handling the arbitration services for matters that arise from Olympic sports and cases involving Anti-Doping claims and is named in the U.S. Olympic Committee Constitution and Bylaws to administer several types of amateur sports disputes. The three major classes of disputes involving Olympics sport in the United States resolved through AAA arbitration are:

Eligibility of an athlete to participate in the Olympics Pan-American Games or other international competition.

Determination of the appropriate National Governing Body (NGB) for a particular amateur sport, and

Positive findings of drug use during out-of-competition testing.

The AAA *Commercial Rules and Mediation Procedures* are utilized to resolve the USOC Athlete Eligibility and NGB determination cases. For matters involving doping claims, the *AAA Supplementary Procedures for the Arbitration of Anti-Doping Disputes* are applied. The AAA provides its arbitration services for other sports organizations that look to arbitration to resolve doping claims.

United States Olympic Committee (USOC) Activities

The Amateur Sports Act, 36 US Code '383, provides that, "in its constitution and bylaws, the USOC shall establish and maintain provisions for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete, coach, trainer, manager, administrator, or official to participate in the Olympic Games, the Pan-American Games, world championship competition, or other such protected competition as defined in such constitution and bylaws." The Ted Stevens Olympic and Amateur Sports Act of 1978, as amended in 1998, reiterated the use of arbitration to resolve Olympic and amateur sports disputes, including the recognition of a proper National Governing Body.

Following the passage of the Act, the USOC amended its constitution and bylaws to provide for arbitration of two general types of dispute—(1) eligibility of an athlete to compete ("eligibility disputes") and (2) the right of an organization to be declared the National Governing Body (NGB) for a particular sport ("franchise disputes"). Eligibility disputes are covered by the USOC Constitution, article IX, '2, and franchise disputes are covered by the USOC Constitution, article VIII, '3. The constitution provides that administration will be handled by the American Arbitration Association, with the Commercial Arbitration Rules applying except as otherwise stated in the constitution.

The Procedures under which AAA administers these disputes can be modified at any time, pursuant to the USOC Constitution and Bylaws, by the agreement of the National Governing Body (NGB) Council and the Athletes Advisory Council (AAC), or by a two-thirds majority vote by the USOC Board of Directors. This process creates a fair system where both athletes and the NGBs can determine the best way to resolve future disputes.

Eligibility Cases

Article IX, '2, the portion of the constitution governing eligibility disputes, reads as follows:

> *"[If] the controversy is not settled to the athlete's satisfaction, the athlete may submit to any regional office of the American Arbitration Association for binding arbitration, a claim against such USOC member documenting the alleged denial [of the right to compete] not later than six months after the date of denial. The Association, however (upon request by the athlete in question), is authorized, upon forty-eight hours' notice to the parties concerned, and to the USOC, to hear and decide the matter under such procedures as the Association deems appropriate, if the Association determines that it is necessary to expedite such arbitration in order to resolve a matter relating to a competition which is so scheduled that compliance with regular procedures would not be likely to produce a sufficiently early decision by the Association to do justice to the affected parties. By maintaining membership in the corporation, each member agrees that any such aforesaid controversy may be submitted to binding arbitration as provided in this Section and furthermore agrees to be bound by the arbitrators' award as a result thereof."*

In view of the nature of these disputes, the Expedited Procedures contained in the Commercial Arbitration Rules are used. Where an athlete requests expedition, the AAA is authorized to expedite the process based on the criteria enumerated in the constitution section quoted above.

In eligibility cases, a single arbitrator is directly appointed by the AAA without submission of a list. The arbitrator usually has legal experience, due to the fact that these cases involve findings of fact and conclusions of law. Attorneys, retired judges, senior law partners or individuals familiar with the particular sport are generally used.

The parties in eligibility disputes are the involved athlete and the National Governing Body of the involved sport. A coach or a trainer may also demand arbitration. The USOC is not a party, although the constitution requires that the USOC receive notices concerning arbitration.

The bylaws require that the award include "findings of fact and conclusions of law."

Franchise Disputes

In franchise disputes, the parties are the involved amateur sports organizations. As is the case with eligibility disputes, the USOC is not a party but its constitution requires it to receive notices concerning these arbitrations.

Article VIII, '2, the portion of the constitution governing franchise disputes, provides for essentially two classes of dispute: (1) disputes between an NGB and an amateur sports organization concerning conduct of the NGB and (2) disputes between two amateur sports organizations over which one is to be the NGB.

The Commercial Arbitration Rules are applied, with the exceptions noted below. The Expedited Procedures do not apply. Three arbitrators are to be assigned to USOC franchise disputes from a list provided by the AAA. Typically, attorneys, retired judges or individuals familiar with the particular sport are suggested as arbitrators. Parties are allowed 15 days to study the list, strike all names to which they have objections and number the remaining names in the order of preference. When these lists are returned to the AAA, the Manager of ADR Services compares indicated preferences and makes note of the mutual choices.

World Anti-Doping Agency

In the late 1990s, the International Olympic Committee (IOC) recognized a challenge facing the Olympic sport movement. The problem of athlete doping in Olympic sports needed to be addressed in a unified manner. In 1999, the Olympic community, governments and international agencies involved in drug enforcement met in Lausanne, Switzerland, for the World Conference on Doping in Sport. The attendees of this meeting agreed upon the foundation of an international standard for controlling doping in Olympic sports. From that meeting, the World Anti-Doping Agency (WADA) was created. WADA's clearly stated goal is to have a "doping-free sport." In advance of the 2004 Athens Olympic Games, for the first time ever, the worldwide Olympic community was united in the creation of the World-Anti Doping Code (WADC).

United States Anti-Doping Agency

The United States Anti-Doping Agency (USADA) was created as the result of recommendations set forth by the USOC's Select Task Force on Externalization. As stated on USADA's website, before the creation of USADA: "The USOC was aware that its program lacked credibility internationally for a number of reasons, and the task force was charged with recommending both the governing structure (as represented by the Board of Directors) and responsibilities, which should be assumed by the new agency."

USADA began operations October 1, 2000, with full authority for drug testing, education, research and adjudication for U.S. Olympic, Pan American and Paralympic athletes. According to its website, "USADA's process eliminates the National Governing Bodies' (NGB) involvement in sanctioning their own athletes." The simplified procedures reduce the time and financial burdens common in appeal procedures.

The WADC requires that anti-doping organizations, such as USADA, provide a "hearing process for any Person who is asserted to have committed an anti-doping violation." The WADC requires the hearing process to respect the following principles, among others: timeliness; administration before a fair and impartial hearing body; provision to the athlete of the right to be represented by counsel; the right to present evidence; and the right to a timely, reasoned decision.

USADA Arbitration

USADA's adjudication process requires a hearing before arbitrators who serve on both the American Arbitration Association roster and the Court of Arbitration for Sport who are U.S. citizens. The hearing proceeds under Rules adopted according to the USOC's Constitution and Bylaws. Although AAA and CAS work collaboratively to provide arbitrators for anti-doping arbitrations, it's important to note that the two organizations are separate from each other.

Although referred to as an arbitration, and indeed, the procedures under which these disputes are administered are referred to as the *American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, AAA's administration actually is an appellate claims-review process for athletes who have allegedly committed anti-doping violations. In fact, the current Procedures allow the athlete an option to appeal the appellate decision rendered under the AAA Procedures directly to CAS, or they can elect to bypass the AAA process altogether and proceed directly to CAS appeal.

AAA's Supplementary Procedures for arbitration initiated by the United States Anti-Doping Agency are used for arbitrations arising out of the Protocol for Olympic and Paralympic Movement Testing. The arbitrators for these disputes are made up of members of the Court of Arbitration for Sport (CAS) who are U.S. citizens.

Examples of Olympic Cases

The AAA's history with Olympic cases dates back several years. In 1996, prior to the start of the Olympic Games in Atlanta, Georgia, the AAA trained a panel of arbitrators to provide "real-time" dispute resolution at the Games. The arbitrators were told to be available at a moment's notice should any disputes be filed. Several cases were filed during the Games, and because of the AAA's swift response, those cases were resolved quickly. Similarly, at the request of the USOC, three arbitrators that were part of the group that was trained prior to the '96 Games were also sent to the 2000 Sydney Games to be on hand throughout the entire Games, in the event that arbitration cases were filed.

Most Olympic-related cases are filed on the eve of a qualifying event or on the eve of the actual Olympics. Three days prior to the opening of the Nagano Games in '98, an Olympic skier filed an arbitration. The AAA acted quickly and had an arbitration hearing scheduled within 24 hours; the arbitrator decided the skier was eligible for the games. In a case that made headlines prior to the Sydney Games, a wrestler filed an arbitration with the AAA, contending that he lost the match because the other wrestler used an illegal hold. The arbitrator ordered a rematch, which the wrestler won. Ultimately, the courts decided in favor of the aggrieved party, and he won a spot at the Sydney Games.

A week before the start of the Beijing games in 2008, a case was filed to fill a vacancy left on a team by an athlete who voluntarily withdrew from competition. An emergency telephonic hearing was heard in the middle of the night U.S. time

to accommodate the athletes already in Beijing. In another matter, shortly after a team was named for these games, another case involving a vacancy was heard and awarded within a 22-hour period in order to meet the required cut-off deadline to submit names for competition.

Other high-profile cases heard by the AAA include boxing, judo, taekwondo, cycling, softball, tennis, badminton, curling, speed skating, rowing and other sports.

Summary

The American Arbitration Association's involvement in administering sports-related arbitrations goes back many years. The Ted Stevens Olympic and Amateur Sports Act of 1978, as amended in 1998, grants the United States Olympic Committee (USOC) the authority "to provide swift resolution of conflicts and disputes involving amateur athletes." The Act also recognizes the American Arbitration Association as the dispute-resolution administrator. As the long-time administrative agency resolving Olympic athlete grievances, the AAA's expertise in this area was deemed to be useful in administering any eventual athlete anti-doping disputes.

The American Arbitration Association (AAA)

Many athletic disputes are resolved under the auspices of the American Arbitration Association, an international, not-for-profit, educational organization dedicated to the resolution of a wide variety of disputes through the use of arbitration, mediation, democratic elections and other forms of alternative dispute resolution (ADR). The AAA, which was formed in 1926, is headquartered in New York City and has offices in cities throughout the United States and Europe. The AAA serves as a center for ADR education and training, issues specialized publications, and conducts research on all forms of out-of-court dispute settlement.

The AAA's Educational Mission

The AAA is dedicated to educating others in the use of alternative dispute resolution. Seminars, conferences and skill-building workshops are held globally to promote an understanding of alternative dispute resolution and to train people in the effective use of ADR tools and procedures. These programs are conducted across many business areas and industries, including commercial, construction, labor-management relations, insurance, banking, securities, computers, international trade and real estate.

American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes

Amended and Effective as of May 1, 2009

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R-1. Applicability

The Commercial Arbitration Rules of the American Arbitration Association (AAA), as modified by these Supplementary Procedures for the Arbitration of Anti-Doping Rule Violations (Supplementary Procedures) shall apply to arbitrations, which arise out of the United States Anti-Doping Agency (USADA) Protocol. To the extent that there is any variance between the Commercial Arbitration Rules and the Supplementary Procedures, the Supplementary Procedures shall control.

R-2. AAA and Delegation of Duties

Anti-doping rule violation cases shall be administered by the AAA through the AAA Vice President then serving as the Secretary for the North American/Central American/Caribbean Islands Decentralized Office of The Court of Arbitration for Sport or his/her designee (Administrator).

R-3. National Pool of Arbitrators

The Pool of AAA Arbitrators for anti-doping rule violation cases shall consist of the Court of Arbitration for Sport (CAS) Arbitrators who are citizens of the USA. (the Arbitrator Pool). Any reference to arbitrator in these rules shall also refer to an arbitration panel consisting of three arbitrators, if applicable. All arbitrators in the Arbitrator Pool shall have received training by the AAA.

R-4. Initiation by USADA

Arbitration proceedings shall be initiated by USADA by sending a notice to the athlete or other person charged with an anti-doping rule violation and the Administrator. The notice shall set forth (i) the offense and (ii) the sanction, consistent with the applicable International Federation rules, the mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol) and the United States Olympic Committee ("USOC") National Anti-Doping Policies, which USADA is seeking to have imposed and other possible sanctions, which could be imposed under the applicable International Federation rules, the mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol) and the USOC National Anti-Doping Policies. The notice shall also advise the athlete of the name, telephone number, e-mail address and website of the Athlete Ombudsman and shall include a copy of the USADA Protocol and these Supplemental Procedures. The parties to the proceeding shall be USADA and the athlete or other person charged with an anti-doping rule violation. The applicable International Federation and World Anti-Doping Association shall also be invited to join in the proceeding as a party or as an observer. The USOC shall be invited to join in the proceeding as an observer. The athlete or other person charged with an anti-doping rule violation shall have the right to invite the Athlete Ombudsman as an observer, but under no circumstances may any party or arbitrator compel the Athlete Ombudsman to testify as a witness. If the parties agree or the athlete or other person charged with an anti-doping rule violation requests and the arbitrator agrees, the hearing shall be open to the public.

R-5. Changes of Claim

After filing of a claim, if any party desires to make any new or different claim, it shall be made in writing and filed with the AAA. The party asserting such a claim shall provide a copy of the new or different claim to the other party or parties. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-6. Applicable Procedures

All cases shall be administered in accordance with Sections R-1 through R-51 of these rules.

At the request of any party, any time period set forth in these procedures may be shortened by the arbitrator(s) where doing so is reasonably necessary to resolve any athlete's eligibility before a protected competition, while continuing to protect the right of an athlete or other person charged with an anti-doping rule violation to a fair hearing. The shortened time periods shall not prohibit the athlete's or other person's right to request three (3) arbitrators.

If a request to expedite the adjudication process is made prior to the arbitration panel being appointed, the AAA shall randomly select one (1) arbitrator from the Arbitrator Pool, who shall determine whether the adjudication process shall be expedited and the schedule pursuant to which the process shall proceed. This randomly selected arbitrator shall not sit on the panel.

If a request to expedite the adjudication process is made after the arbitration panel is appointed, the arbitration panel shall determine whether the adjudication process shall be expedited and the schedule pursuant to which the process shall proceed.

The AAA shall immediately notify the Athlete Ombudsman and the USOC General Counsel's office of any arbitration that may be or has been initiated under these expedited procedures.

R-7. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with

respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings and any other administrative matter.

R-9. Fixing of Locale

The locale of the arbitration shall be in the United States at a location determined by the Administrator using criteria established by the AAA but making every effort to give preference **to the choice of the athlete or other person charged with an anti-doping rule violation.**

R-10. Qualifications of an Arbitrator

a. Any arbitrator appointed pursuant to Section R-11, or selected by mutual choice of the parties or their appointees, shall be subject to disqualification for the reasons specified in Section R-14. If the parties specifically so agree in writing, the arbitrator shall not be subject to disqualification for those reasons.

b. Party-appointed arbitrators are expected to be neutral and may be disqualified for the reasons set forth in R-14.

R-11. Appointment of the Arbitration Panel

The arbitrator(s) shall be appointed in the following manner:

a. Immediately after the initiation of a proceeding by USADA (as set forth in R-4), the AAA shall send simultaneously to each party to the dispute an identical list of all names of persons in the Arbitrator Pool.

b. The proceeding shall be heard by one (1) arbitrator from the list of persons in the Arbitrator Pool (as set forth in R-3), unless within five (5) days following the initiation of the proceeding by USADA, a party elects instead to have the matter heard by a panel of three (3) arbitrators from the Arbitrator Pool (Arbitration Panel). Such election shall be in writing and served on the Administrator and the other parties to the proceeding.

c. If the proceeding is to be heard by one (1) arbitrator, that arbitrator shall be appointed as follows:

> i. Within ten (10) days following receipt of the Arbitrator Pool list provided by the Administrator under R-11a, the parties shall notify the Administrator of the name of the person who is mutually agreeable to the parties to serve as the arbitrator.
>
> ii. If the parties are unable to agree upon an arbitrator by the time set forth in paragraph c.i of this

Rule, each party to the dispute shall have five (5) additional days in which to strike up to one third of the Arbitrator Pool, rank the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

d. If the proceeding is to be heard by a panel of three (3) arbitrators, those arbitrators shall be appointed as follows:

i. Within five (5) days following receipt of the Arbitrator Pool list provided by the Administrator under R-11a or from receipt of notice of the request to have a three (3) arbitrator panel, whichever is later, USADA, or USADA and the International Federation, if a party, shall designate one (1) arbitrator from the Arbitrator Pool. The athlete or other person charged with an anti-doping rule violation shall have an additional five (5) days following receipt of the arbitrator choice from USADA, or from USADA and the International Federation, if a party, to designate one (1) arbitrator from the Arbitrator Pool.

ii. The two (2) arbitrators chosen by the parties shall choose the third arbitrator from among the remaining members of the Arbitrator Pool. The AAA shall furnish to the party-appointed arbitrators the Arbitrator Pool list. If the two (2) arbitrators chosen by the parties are unable, within seven (7) days following their selection, to choose the third arbitrator, then the party-appointed arbitrators shall so notify the AAA which shall notify the parties. Within five (5) days of receipt of notice from the AAA that the party-selected arbitrators are unable to reach or have not reached agreement, the parties shall then each strike up to one third of the Arbitrator Pool and rank the remaining members in order of preference. From among the persons who have not been stricken by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of one (1) arbitrator to serve. The third arbitrator shall serve as Chair of the Arbitration Panel.

R-12. Number of Arbitrators

The number of arbitrators shall be one (1) unless any party requests three (3).

R-13. Notice to Arbitrator of Appointment

Notice of the appointment of the arbitrator, whether appointed mutually by the parties or by the AAA, shall be sent to the arbitrator by the AAA, together with a copy of these rules The signed acceptance of the arbitrator shall be filed with the AAA prior to the opening of the first hearing.

R-14. Disclosure and Challenge Procedure

a. Any person appointed as an arbitrator shall disclose to the AAA any circumstance likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.

b. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

c. Upon objection of a party to the continued service of an arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

R-15. Communication with Arbitrator

a. No party and no one acting on behalf of any party shall communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator shall be sent to the AAA for transmittal to the arbitrator. No party and no one acting on behalf of any party shall communicate with any arbitrator concerning the selection of the third arbitrator.

b. Once the panel has been constituted, no party and no one acting on behalf of any party shall communicate unilaterally concerning the arbitration with any arbitrator.

R-16. Vacancies

a. If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

b. In the event of a vacancy in a panel of arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

c. In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-17. Preliminary Hearing

a. At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion. There is no administrative fee for the first preliminary hearing.

b. During the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of the issues and claims, a schedule for the hearings and any other preliminary matters.

R-18. Exchange of Information

a. At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information, and (ii) the identification of any witnesses to be called.

b. Unless otherwise agreed by the parties or ordered by the arbitrator, at least five (5) business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing.

c. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

R-19. Date, Time, and Place of Hearing

Except as may be mutually agreed by the parties or upon the request of a single party for good cause as

may be determined by the arbitrator, the hearing, including any briefing ordered by the arbitrator, shall be completed within three (3) months of the appointment of the arbitrator. On good cause shown by any party, the hearing process shall be expedited as may be necessary in order the resolve the determination of an athlete's eligibility prior to any protected competition or team selection for a protected competition.

R-20. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the hearing is open to the public as prescribed in R-4 (the athlete or other person charged with an anti-doping rule violation have the right to invite the Athlete Ombudsman as an observer regardless). Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than (i) a party and its representatives and (ii) those entities identified in R-4, which may attend the hearing as observers. If the parties agree, or the athlete or other person charged with a doping offense requests and the arbitrator agrees, hearings or any portion thereof may also be conducted telephonically.

R-21. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three (3) days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-22. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-23. Stenographic Record

Any party desiring a stenographic record of all or a portion of the hearing shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three (3) days in advance of the start of the hearing or as required by the arbitrator. The requesting party or parties shall pay the cost of the transcript they request, whether full or partial. If a party seeks a copy of a transcript, full or partial, requested by another party, then the other party shall pay half the costs of the transcript to the requesting party. If the entire transcript is requested by the parties jointly, or if all or a portion of the transcript is determined by the arbitrator to be the official record of the proceeding or necessary to the arbitrator's decision, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator with the costs of the transcription divided equally between the parties. The arbitrator may award the costs of transcription for a transcript requested by the arbitrator as expenses of the arbitration pursuant to R-48.

R-24. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-25. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative. A party or parties causing a postponement of a hearing will be charged a postponement fee, as set forth in the administrative fee schedule.

R-26. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-27. Conduct of Proceedings

a. USADA shall present evidence to support its claim. The athlete or other person charged with an anti-doping rule violation shall then present evidence to support his/her defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

b. The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

c. The parties may agree to waive oral hearings in any case.

R-28. Evidence

a. The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

b. The arbitrator may only retain an expert or seek independent evidence if agreed to by the parties and (i) the parties agree to pay for the cost of such expert or independent evidence or (ii) the USOC agrees to pay for the cost of such expert or independent evidence. The parties shall have the right to examine any expert retained by the arbitrator and shall have the right to respond to any independent evidence obtained by the arbitrator.

c. The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

d. The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

e. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

f. Hearings conducted pursuant to these rules shall incorporate mandatory Articles from the World Anti-Doping Code (Annex A of the USADA Protocol). If the World Anti-Doping Code is silent on an issue,

then the USADA Protocol, the USOC National Anti- Doping Policies, and the International Federation's anti-doping rules shall apply as determined by the arbitrator.

R-29. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

a. The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

b. If the parties agree, if any party requests and the arbitrator agrees, or if the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator within 30 days of the conclusion of the hearing. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-30. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-31. Interim Measures

The arbitrator may take whatever interim measures he or she deems necessary.

R-32. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. The arbitrator shall declare the hearing closed unless a party demonstrates that the record is incomplete and that such additional proof or witness(es) are pertinent and material to the controversy. If briefs are to be filed or a transcript of the hearing produced, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs; or receipt of the transcript. If documents are to be filed as provided in R-29, and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

R-33. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time required by R-38, the matter may not be reopened unless the parties agree on an extension of time.

R-34. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have

waived the right to object.

R-35. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-36. Serving of Notice

a. Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

b. The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (email), or other methods of communication.

c. Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-37. Majority Decision

When the panel consists of more than one arbitrator, a majority of the arbitrators must make all decisions.

R-38. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than thirty (30) days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

R-39. Form of Award

Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law. In all cases, the arbitrator shall render a reasoned award.

R-40. Scope of Award

a. The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the World Anti-Doping Code, International Federation Rules, the USADA Protocol or the USOC Anti-Doping Policies.

b. In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards.

R-41. Award upon Settlement

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award."

R-42. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

The AAA shall also provide a copy of the award (preferably in electronic form) to the appropriate National Governing Body, the USOC General Counsel's office and the Athlete Ombudsman.

The award is public and shall not be considered confidential.

R-43. Modification of Award

Within five (5) days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given five (5) days to respond to the request. The arbitrator shall dispose of the request within five (5) days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-44. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration. If the matter is appealed to CAS, the AAA shall furnish copies of documents required in connection with that proceeding.

R-45. Appeal Rights

The arbitration award may be appealed to CAS as provided in Annex A of the USADA Protocol, which incorporates the mandatory Articles on Appeals from the World Anti- Doping Code. Notice of appeal shall be filed with the Administrator within the time period provided in the CAS appellate rules. Appeals to CAS filed under these rules shall be heard in the United States. The decisions of CAS shall be final and binding on all parties and shall not be subject to any further review or appeal except as permitted by the Swiss Federal Judicial Organization Act or the Swiss Statute on Private International Law.

R-46. Applications to Court and Exclusion of Liability

a. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

b. Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.

c. Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

d. Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

R-47. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee and any other administrative fee or charge shall be paid by the USOC.

R-48. Expenses

The expenses of witnesses for any party shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other reasonable and customary expenses of the arbitrator shall be paid by the USOC. The expenses associated with an expert retained by an arbitrator or independent evidence sought by an arbitrator shall be paid for as provided in R-28b.

R-49. Arbitrator's Compensation

a. Arbitrators shall be compensated at a rate consistent with the current CAS rates.

b. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties and the USOC.

c. Any arrangement for the compensation of an arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

d. Arbitrator fees shall be paid by the USOC.

R-50. Payment of Fees, Expenses and Compensation for Citizens of a Country Other than USA

Notwithstanding R-47, R-48 and R-49, if the athlete or other person charged with an anti-doping rule violation is a citizen of a country other than the USA, then the authority requesting that USADA prosecute the anti-doping rule violation shall pay for the arbitration fees, expenses and arbitrator's compensation associated with the arbitration. The AAA may require such authority to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee. If such payments are not made, the AAA may order the suspension or termination of the proceeding.

R-51. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

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SUMMATION - A WORK IN PROGRESS

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SUMMATION - A WORK IN PROGRESS

Introduction

An experienced criminal defense lawyer will tell you, a good summation begins to take shape when you first meet the client, as you begin to understand the nature of the charges you will be defending. A trial lawyer who writes his or her entire summation after the close of evidence, really does not understand the process. Simply put, a good summation is a work in progress. It is shaped and continues to be shaped from the time you meet your client until the trial ends.

What is included in a summation will of course vary from case to case, the particular defendant in the hot seat, the strength or weakness of the Government's case and whether or not any particular affirmative defense has been put forward. So too will the substance and content of a summation vary with the degree of confidence and experience of the lawyer delivering it.

THE "STYLE" OF A SUMMATION - BE YOURSELF

Humor

Every trial lawyer has his or her own style and a unique personality. Not everybody can be funny. If you are not funny, do not try and be funny.

While humor can be effective, it must be selectively used, with great care taken not to offend. The serious nature of a criminal trial should never be compromised and the jury never allowed to conclude that the defense posture is frivolous or lighthearted.

Varied skills

Not every trial lawyer is blessed with the same verbal skills and not all trial lawyers have a great command of the English language. While some litigators are very comfortable on their feet and are able to proceed with the use of a thin outline, others may require a script to guide them as they stand before a jury at summation. Choosing a style comfortable for you is the key to a comfortable performance. The nervous energy that all of us feel in the well of a courtroom can be minimized by preparation, practice and by choosing a style that is comfortable for you. Even when your summation is completely written out, the practitioner should be sufficiently familiar with what is on the written page so as not to feel trapped by notes and so that your delivery style is calm and personalized.

KNOW AND UNDERSTAND YOUR CASE

The "theme" of your summation

Every summation should have a "theme" - a beginning, a middle and an end, a consistent theme that works through the beginning, the middle and the end. Once you pick a theme, stick to it. Picking your theme is as important as what you say and how you say it.

Your "theme" must be workable

Most criminal defense lawyers recognize that in some cases there simply may not be a lot you can effectively argue, when for example the weight of the evidence against your client is overwhelming. Even in a tough case, once the decision has been made to proceed to trial, the defense you choose must give you something to work with. In those cases where the decision to proceed to trial is made because no reasonable plea offer is available, there may still be a "concept" defense which although thin, will nevertheless give the experienced practitioner something to discuss in summation that does not do damage to the defense credibility.

QUESTIONS TO ADDRESS

Were the Government's witnesses credible; is the forensic evidence suspect; is there an "element" of the crime that has not been established by proof beyond a reasonable doubt; is there an affirmative defense to the crime which although not fully supported by the evidence, may still be the only viable defense.

Regardless of the defense posture and despite what may appear to be overwhelming evidence, a consistent, well reasoned argument that is at least marginally supported by some evidence may be the centerpiece of the defense argument or the only available argument to construct your summation around.

TAKING THE "STING" OUT OF THE PROSECUTOR'S SUMMATION

Every criminal case has a heart that one side or the other will seek to exploit in their respective closing arguments. The heart of the trial must be understood and it must be dealt with head-on in summation or you have no hope of prevailing.

Who is the defendant? - What is the nature of the crime charged? - Who are the witnesses? - What is the quality of the evidence? - How sympathetic is the victim?

In simple terms knowing your case is the key to developing a successful defense, or at the very least, a defense that carries an opportunity for success.

Is the defendant particularly notorious; or is the defendant an ordinary person but is the crime charged particularly notorious so as to create an unlevel playing field before the trial even starts.

Is the victim particularly vulnerable or sympathetic; does the crime itself carry with it such a degree of public outrage that a jury may demand that somebody be punished even if the evidence is weak. These are questions that need to be considered when shaping your summation and when selecting a summation theme.

Concessions can be good

Very often, the outcome of a trial may focus on one fact, issue, or rule of law, with the majority of the evidence not really in dispute. When a criminal defense lawyer is in the position of "conceding" that which need not be disputed, it can help establish and maintain credibility in the courtroom and if carefully and

effectively planned can render much of the prosecution's arsenal of evidence ineffective.

Thus for example, if the affirmative defense of "entrapment" is to be interposed as the defense, the "facts" that established the commission of the crime are generally not really relevant, as the verdict will be determined not by "what" happened but "why" it happened. Accordingly, in an entrapment defense, evidence that merely establishes the commission of the offense need not be challenged at trial and should not be challenged in summation, as the only issue in play in that case would be the "conduct" of Government agents and any proof relevant to the issue of the defendant's "pre-disposition" to commit the crime in question. Accordingly, an example of what a good defense summation might sound like in a case where the defense of "entrapment" is interposed may read as follows:

> **"Ladies and gentlemen virtually everything that the Government told you it would prove beyond a reasonable doubt, is really not in dispute.**
>
> **My client did participate in an effort to rig the bidding process with regard to the Government contracts in question.**
>
> **My client did meet with various people and at times he did engage in conversations that in a normal case might allow you to conclude that the crime in question had in fact been committed. Indeed, as the evidence that is not in dispute shows, my client even went so far as to submit a particular bid following the explicit instructions of the Government agent who we submit caused my client to commit this crime.**
>
> Accordingly ladies and gentlemen, what happened in this case is not something you should waste your time discussing when you begin your deliberations. We do not challenge the fact that a bid was submitted and that my client knew when he

submitted the bid that it would be the "lowest" bid and therefore, absent the inappropriate conduct of the Government agents who "entrapped" my client into committing these crimes the Government might well have proven its case".

"The issue in this case therefore, - the "only" issue in this case that remains to be resolved is whether my client was "pre-disposed" to commit the crime or whether he was not pre-disposed to do so and was entrapped into committing this offense by a Government agent".

By "conceding" most of the evidence that may have taken weeks for the Government to introduce, you will have softened the impact of what might otherwise appear to be strong evidence and you have suggested that the jury focus on the only issue that could possibly result in a defense verdict.

It is important to note, that if in your summation you intend to concede much of the Government's proof, your efforts at trial should be consistent. Accordingly, vigorously cross-examining witnesses who offer evidence that you intend to embrace or ignore, makes little sense. Remember, a really "good" summation begins to take shape before a trial begins and continues to build throughout the trial. While parts of the theme can be modified or changed in response to unpredictable trial dynamics, (i.e. a witness self-destructs or key evidence is excluded), the "theme" of a summation must be understood before the trial begins and trial strategy developed to help explore and support that theme. A work in progress assumes some change and modification, it also assumes however, that the general outline of your summation is fairly well thought out before the trial begins.

USE OF EXHIBITS AND/OR GRAPHICS

A picture can be worth a thousand words

In some cases a particular exhibit or a particular snippet of trial testimony captures the linchpin of the argument being advanced and can by itself create a reasonable doubt or demonstrate the weakness of the Government's case or a failure of proof on a key element in the case. Using a document, exhibit or other piece of evidence as a summation exhibit can be very effective, assuming of course that one has fully thought through the argument being advanced and also considered any valid response to your argument that can leave your case shattered. Remember, in virtually all jurisdictions, the prosecution has the final word in summation, so carefully think through the any available come-back when you choose an exhibit to build your summation around.

Using the trial record

Every good trial lawyer will tell you that quoting from the trial transcript can be an effective way of making your point in summation, especially when the testimony you quote is developed through the questioning of a Government witness whose credibility will undoubtedly be vouched for by your adversary. While reading "long" stretches of testimony is often boring and not effective, reading a snippet of testimony which you place in proper context can be very effective, especially if set up well. The following example suggests the process:

> **"Ladies and gentlemen, the reason why you must acquit - the reason why you must conclude that the Government has failed to establish its case beyond a reasonable doubt, is found in the testimony of the Government's own witness who told you under oath that he could not be sure that the weapon recovered from the defendant's apartment was the weapon used to commit the crime charged. This is not opinion ladies**

and gentlemen, this is not argument, this is evidence that was developed in the course of this trial and it is undisputed.

Thus, on page 384 of the transcript the following testimony appears during the questioning of Detective James Preston, the Government's ballistic expert":

Question: Did you test the weapon recovered from the defendant's apartment against the bullet fragments recovered from the victim.

Answer: Yes.

Question: After conducting your tests would it be a fair statement that you concluded beyond question that the weapon recovered from my client's apartment was not the weapon used to shoot the victim?

Answer: Yes counselor you are correct.

"Ladies and gentlemen that is the testimony. That is the testimony that was provided by the Government's own expert. Regardless of how the prosecutor chooses to characterize that testimony, that testimony requires you to acquit the defendant."

In a trial where this kind of evidence is clear and relevant, this snippet of testimony should be enlarged into a poster-size placard and used as a summation exhibit. Pointing to the actual words when making your point hammers home the point. The fact that the testimony is in black and white and a part of the official trial record that the jury can see, makes the point that much more dramatic.

Use of Graphics

In defending a case that is document rich, or in a case where the defense argument relies on certain records to explain why the defendant may have lacked the specific criminal "intent" required to commit the crime charged, reference to exhibits in summation can help persuade a jury to "focus" on those particular defense-friendly records when deliberating. By identifying specific exhibits in summation, defense counsel can guide the deliberations in a way that steers the jury into considering the defense theory and defense arguments. If important defense-friendly exhibits are not singled out in summation, the hundreds or thousands of records introduced in a long complex white-collar criminal case may prevent jurors from finding or focusing on that which the defense believes to be important.

Where the trial budget permits, using graphics to enhance or dramatically highlight a particular exhibit may cause jurors to better remember a particular exhibit from among many, because it was brought to their attention in final argument in a dramatic and impressionable way. Where the budget does not permit graphic assistance, other less costly ways to accomplish the same objective are available. For example, having copies of a particular exhibit distributed to jurors while you focus on them in summation will allow each juror to see the language being quoted and it will help each juror understand that your words are not derived from a fertile imagination but from the very face of the exhibit in evidence. So too can walking a copy of certain exhibits past each juror in summation be effective if it is the type on the exhibit or photo can be seen and understood without needing up close study.

Caution

Wherever possible, put away or take back a particular exhibit once that part of your summation passes or jurors will fool with them or be distracted by them as you move on to cover other topics or issues.

A good summation requires that you control the attention of the jury throughout the argument. Creating distractions that undermine that objective is counter-productive. Managing your time, your argument and the demonstrative exhibits you choose to use is the key to an effective presentation.

REPETITION CAN BE OBNOXIOUS, BORING OR VERY EFFECTIVE

All of us wince when listening to a public speaker making the same point over and over again. If you have nothing else to say in a summation except repeat arguments previously made, you should sit down. Most experienced trial lawyers will tell you that nothing can undermine a good, pointed, effective summation than repeating your arguments over and over again until everyone in the courtroom is bored to tears and the effective part of the summation lost in a sea of needless repetition.

Accordingly, a summation should have a beginning, a middle and an end. It is important however, to "end" when you come to the end and not continue to wander aimlessly about the courtroom because you think you may not have spoken long enough or you believe that you are doing such a good job that nobody wants you to stop.

Repetition can be effective if used properly and selectively

Despite the general caution against repeating oneself in summation, there are those select cases where key points should be repeat, because from the defense perspective the entire case may rise or fall on the jury understanding that the whole case turns on a particular issue.

Thus, for example if the defense to a homicide case is self-defense or legal justification, repetition can be effective. An example of effective "repetitive" argument is set out below.

Example #1 - a homicide case with a defense of justification:

> **"Ladies and gentlemen my client acted in self-defense when he shot Mr. Jones who at the time was coming at him with a raised hammer..."**
>
> **"Ladies and gentlemen my client is not guilty of the crime of murder or manslaughter, because the force he used was that which a reasonable person would consider appropriate under the circumstances my client found himself in at the time..."**
>
> **"Ladies and gentlemen you cannot convict my client of the crime of murder or manslaughter even though someone died, because as his Honor will instruct you the law allows for the use of force even 'deadly' force under certain circumstances that we submit existed in this case..."**
>
> **"Ladies and gentlemen you will conclude from the evidence that my client did not have a 'duty to retreat' and accordingly if you conclude that the force he used was reasonable under the circumstances, you must find him not guilty even though he killed someone, because that act of violence was legally justified under the law..."**

Even though the "same" point may have been made five times, the fact remains that someone died in the case and for a jury to conclude that an act of violence that would otherwise be "murder" was legally justified, is a defense that must be hammered home again and again. So too is it important to note that the opportunity to say that the defendant's actions were legally "justified" arises in different contexts where although the basic argument is repeated, it is nevertheless being crafted around different issues that the jury will be asked to consider.

Jury Nullification

As a rule, you may not argue for Jury Nullification, i.e. asking a Jury to acquit, even though the proof of guilt is overwhelming. Thus, you may not say, the defendant may be guilty, but he is such a nice man, you should convict him

anyway. By artfully stressing evidence favorable to the accused or evidence of serious police misconduct however, you may be able to imply that the Jury should acquit despite the compelling evidence, but be careful and mindful of your professional ethical obligations, (see: Prof. Resp. Crim. Def. Prac. 3d § 34:3) and in New York, and in New York, People v. Douglas 680 N.Y.S.2d 145, (1998) N.Y. Slip Op. 98572

A Prosecutor's Summation

Unlike a defense lawyer's summation which often has to employ a series of skilled and nuanced arguments as those suggested above, a strong prosecution summation is based on evidence and structure. The typical format is as follows:

A. A strong, gripping, introduction to the events (e.g. On the winding tree light streets of the west village, here in our city, the defendant went robbing)
B. A recitation of the facts, through argument, given chronologically, rather than witness by witness (n.b. if the government goes witness by witness it is easier to isolate each fact as it relates to each witness and destroy that fact)
C. An application of the facts to the specific law (i.e. Because the robbery displayed what appeared to be a gun, he is guilty of robbery in the first degree)
D. A response to the defense case (e.g. defense counsel argues the witnesses are not credible or the law of self-defense does not apply to this case)
E. A call to arms – bring the victim justice

Making Objections

At times, it is important to break up the flow of a seasoned prosecutor's summation if given good reasons. Thus, if the prosecutor: 1) comments on matters precluded from evidence or never introduced 2) vouches for his own witnesses' credentials or credibility 3) argues that the streets would be safer if you convict 4) makes inappropriate references, or analogies, to prejudicial matters such as calling the defendant a monster, an animal, or conjuring up images of the columbine shooting 5) injects himself into the proceeding by claiming he heard the confession, he saw the blood on the sidewalk.

If an objectionable comment is made you may object, state your reason, and ask for a remedy. Prosecutors' summations are often zealous and may give grounds for an appeal. Also remember, since the prosecutor is likely to have the last bite at the apple it is important for the jury to see that you are still standing your ground.

Anticipating Arguments

Since the prosecutor is likely to give the final summation, it is important to anticipate their arguments and responses to your arguments. The best trial lawyers always think the hardest about their cases and put themselves in the shoes of their adversary. While there are too many scenarios to go into in this lecture, the following example is common and makes the point.

Defense Counsel Argument: Law enforcement lied.

Prosecutor's Summation: "Ladies and gentlemen, everything in life we do, we do for a reason. You are thirsty, you have a drink. You are tired, you lie down. The big things in life, we do those for big reasons. Taking the stand, taking an oath and telling a lie in front of a Supreme Court judge with a court reporter

taking down every word, preserving every word... You wouldn't do that unless there was a really big reason for it. In some cases, sure there are reasons. If this were a civil case with millions of dollars at stake sure that might be a reason. If there was some long standing rivalry or vendetta, maybe that would be a reason. There is no reason here. You have to admit to commit perjury to send someone away for no reason, you would have to be a real evil man, a psychopath. And I submit you met these officers/agents, got to see them, hear them, and I know you can see they are not evil. So I submit you must reject the defense argument that they made it up.

Defense Counsel Amended Argument (after anticipating the response): Listen, we are not saying that these officers met in a tower somewhere laughing and planning to frame an innocent man. The prosecutor will likely tell you that these officers are good, decent men. Well, on the night in question they jumped to conclusions, when they were pushed on their conclusions they, whether intentionally or a trick of the mind, they found their way to the facts they wanted to recall. Did they discuss their testimony with each other? Yes, they said they did. Did they meet and go over it with prosecutor's ahead of time? Of course. And so the final fact pattern you see here today is not a product of evil. It is a product of jumping to conclusions, a product of playing loose with the facts, and the power of sticking by your fellow officer and the power to succumb to suggestion. Well you too have the power. The power to not convict. To not succumb to suggestion. To send him home.

Conclusion

Every case is different - each trial lawyer is a unique individual. Each summation should be the same, careful, well organized argument that is consistent with reasonableness and consistent with the defense interposed at trial and the trial record.

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EXHIBIT 1

Prof. Resp. Crim. Def. Prac. 3d § 34:3

Professional Responsibility in Criminal Defense Practice
Database updated October 2014
John Wesley Hall, Jr.
Chapter 34. Other Ethical Issues

References

§ 34:3. The ethics of presenting jury nullification

Generally

Sometimes the only "defense" for a client is jury nullification. This arises from different scenarios, including: the prosecutor made no plea offer that the client could accept and the client has nothing to lose and everything to gain from a trial; or the client needs to explain to the jury his or her reasons for acting as he or she did so as to not sound irrational or subhuman.[2]

Jury nullification always has been a controversial subject, and it has a long and checkered history, which need not be repeated here. Jury nullification has been recognized since the beginning of the common law, but it fell into disuse with the advent of legally trained judges.[3] Nevertheless, the courts have always recognized that juries have the power, but not the right,[4] to grant mercy or to nullify simply by refusing to convict, even where the facts are virtually uncontroverted,[5] no questions asked.

Many prosecutors[6] and courts[7] counsel against permitting jury nullification at all. Judges often feel constrained to construe relevance issues to exclude evidence offered for no other purpose than to nullify.[8]

Prosecutors are always on guard against nullification by questioning jurors in voir dire whether they can follow the law, even if they might disagree with it.[9] For example, in drug cases, prosecutors universally want to know whether jurors feel that victimless crimes should not be prosecuted. In jury sentencing states, prosecutors want to know that the jury can consider the full range of punishment and the effect of mandatory minimums. Prosecutors sometimes file motions in limine to cut off jury nullification arguments.[10]

Similarly, defense lawyers are always trying to get evidence before the jury that will help explain the defendant's actions in the hope that the jury will find a way to acquit, even if it is directly contrary to the court's instructions.[11]

Cross-examination of a snitch, for example, can legitimately get the punishment question before the jury in an effort to show what punishment the snitch avoided in exchange for his or her testimony. In jury sentencing states, defense counsel wants to know in voir dire whether the jury can consider sentencing alternatives that might be available.

Not all judges are so inflexible. The legendary Jack Weinstein contends that relevance should be loosely construed to permit development of a jury nullification defense:

> The judge may, and sometimes should, exercise some leniency in defining relevance which might allow a jury to consider nullification sensibly. Jurors will then have the information and freedom necessary to ignore the judge's instructions to follow the law if the jurors think the law as applicable to the case before them is unjust... . Addressing the jury or judge is the best chance a defendant may have to obtain publicity for his or her views. Arguably, the opportunity verges on a First Amendment right. A less stringent relevancy definition than the rigid and logical one in Rules 401, 402, and 403 of the Federal Rules of Evidence is justified in such cases.[12]

Also, the court should not substitute its judgment for that of the defendant as to necessity of the admissibility of the evidence.[13] Some view jury nullification as a necessary check on government abuse or overreaching.[14]

But, even if defense counsel succeeds in getting jury nullification before the jury, there is no right to a jury instruction on the jury having the power to determine the law.[15]

Ethical duty of defense counsel

It is submitted that defense counsel has an ethical duty to pursue jury nullification if it is the only "defense." Some judges apparently disagree[16] while others permit evidence tending to support a nullification defense.[17] If nullification is the only defense, counsel should consult with the accused before embarking on it.[18]

Lawyers generally are told that they cannot mount a frivolous defense, but the Sixth Amendment right to a jury trial and its concomitant duty on defense counsel require that criminal cases be viewed differently. Two Rules of Professional Conduct govern:[19]

Rule 1.2 provides as follows:

> Rule 1.2. Scope of representation.
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> ...
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 3.1 of the Rules of Professional Conduct provides as follows:

> Rule 3.1. Meritorious claims and contentions.
>
> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

This is all in recognition of the maxim that "[i]t is important to remember that while defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."[20]

As stated in § 9:3, defense counsel has an ethical and Sixth Amendment duty to zealously represent the interests of the client. This includes pursuing a jury nullification defense if that is the only defense the client has. The client has a right to insist on a trial and putting the government to its proof, no matter how suicidal it may seem to the criminal defense lawyer.[21] Implicit in this must be that defense counsel can pursue jury nullification as best he or she can under the constraints that the trial judge will impose, even if it is just to show that the client's motivations were not evil,[22] even if only for sentencing purposes.

The D.C. Bar has issued an opinion agreeing with *U.S. v. Sams*[23] that good faith arguments for jury nullification are not unethical: "Good faith arguments with incidental nullification effects do not violate the Rules of Professional Conduct" as long as there is "an[] evidentiary argument for which a reasonable good faith basis exists, provided that the lawyer exercises his ability to do so within the constraints of existing law."[24]

Relationship of ineffective assistance claims

The ineffective assistance cases involving failed jury nullification defenses support the conclusion that defense counsel has a duty to put on such a defense when warranted. In *Strickland v. Washington,*[25] the Supreme Court held that the possibility of jury nullification should have no bearing on the prejudice prong of effective assistance of counsel.[26] (Similarly, jury nullification can complicate a collateral estoppel determination.[27])

This does not mean, however, that defense counsel is ineffective for pursuing jury nullification when there is no other defense. Indeed, cases have held that a failed defense of jury nullification (or, in death cases, a plea for mercy unimpeded by horrible facts[28]) is not ineffective assistance of counsel.[29] Where there is a possible defense, and it is overlooked, merely relying on jury nullification can be ineffective assistance of counsel.[30]

Losing acceptance of responsibility

Pursuing a jury nullification defense could preclude a downward departure for acceptance of responsibility,[31] and it could open the door to other evidence[32] or rebuttal argument.[33]

Use of a shadow defense

Many, if not most, judges will limit defense counsel's efforts to pursue jury nullification. Therefore, the only way to provide the jury with an opportunity to nullify may be to utilize a "shadow defense" "such as entrapment or necessity ... to open up the theory of the case, allowing for governmental misconduct or the ethical (if not practical) necessity of the

defendant's actions."[34] Thus, the trial judge will have to allow the evidence in if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,"[35] and trial judges should not second guess counsel's determination of the need for the evidence.[36]

Footnotes

1 See generally Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Ch 10 (1998) (a wonderful and indispensable compendium of the history and use of jury nullification); Clay Conrad, Jury Nullification: The Lawyer's Challenge, 24 The Champion 30 (Jan./Feb. 2000); Clay Conrad, Jury Nullification as a Defense Strategy, 2 Tex. Forum Civ. Lib. & Civ. R. 1 (1995); Alan W. Scheflin & Jon M. Van Dyke, Merciful Juries: The Resilience of Jury Nullification, 48 Wash. & Lee L. Rev. 165 (1991); Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 S. Cal. L. Rev. 168 (1972); David N. Dorfman & Chris K. Iijima, Fictions, Fault, and Forgiveness: Jury Nullification in a New Context, 28 U. Mich. J.L. Ref. 861 (1995); Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149 (1997); Andrew Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253 (1996); Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 Am. Crim. L. Rev. 239 (1993); Steven M. Warshawsky, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L. J. 191 (1996).
Carrie Ullman, D.C. Bar Opinion 320: How a Defense Attorney Can Advocate for Her Client Without Encouraging Jury Nullification, 18 Geo. J. Legal Ethics 1097 (2005).

> Comment: This section only covers an ethical and practical overview of the issues involved in defense counsel's attempt to present jury nullification. For the history and development of jury nullification, most of these books and articles contain an historical discussion. The most comprehensive is Conrad's excellent book.

Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine (2013); Jury Nullification Volume I: Featuring a Reprint of Lysander Spooner's Classic Work; An Essay on the Trial By Jury (1852) Plus Two 20th Century Essays (2001) by Mike Timko.

2 This is common in political trials, such as cases from the early 1970's involving Vietnam War protestors; see, e.g., U.S. v. Dellinger, 472 F.2d 340, 408, 22 A.L.R. Fed. 159 (7th Cir. 1972); or draft resisters; see, e.g., U.S. v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969); or more recent cases involving abortion protestors. See, e.g., Zal v. Steppe, 968 F.2d 924 (9th Cir. 1992), as amended, (July 31, 1992) (attorney contempt from conduct of abortion protest trial).

3 See the authorities cited in note 1.
Before the ready availability of statutes and cases by the bar and even the public, jurors in many states had the power to determine both the law and fact applicable to the case. In 1802, Supreme Court Justice Samuel Chase was impeached for not permitting a jury, while sitting as a Circuit Justice, to determine the law applicable to the case. Chase was not convicted, however, and the movement away from juries deciding questions of law was thus in full swing.

4 U.S. v. Gonzalez, 110 F.3d 936, 947–48, 46 Fed. R. Evid. Serv. 1076 (2d Cir. 1997):

> However, the possibility of nullification does not appear to be element specific: It remains as long as any element is left for the jury to consider. Moreover, jury nullification, while it is available to the defendant, is only a power that the jury has and not a "right" belonging to the defendant, much less a substantial right.

5 See, e.g., Morissette v. U.S., 342 U.S. 246, 276, 72 S. Ct. 240, 96 L. Ed. 288 (1952):

> Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

6 Cf. Steven M. Warshawsky, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L. J. 191 (1996), cited in note 1. The author does not contend that it is unethical for defense counsel to pursue jury nullification. Rather, he is providing prosecutors with guidance to head off nullification since there is no right to present it as a defense.

7 U.S. v. Sepulveda, 15 F.3d 1161, 1189–90, 38 Fed. R. Evid. Serv. 1297 (1st Cir. 1993); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) ("counsel may not press arguments for jury nullification in criminal cases"); U.S. v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997) ("[N]o jury has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court."); Com. v. Leno, 415 Mass. 835, 616 N.E.2d 453, 457 (1993).

8 U.S. v. Griggs, 50 F.3d 17 (9th Cir. 1995); U.S. v. Johnson, 62 F.3d 849, 851, 1995 FED App. 0260P (6th Cir. 1995); U.S. v. Malpeso, 115 F.3d 155, 162, 47 Fed. R. Evid. Serv. 572 (2d Cir. 1997).

9 Warshawsky, at 224–27.

10 Warshawsky, at 228–31. Examples are: *Zal v. Steppe*, supra (where the prosecutor moved in limine to prevent defense counsel from using certain inflammatory words and phrases at trial and defense counsel repeatedly violated the trial court's order not to use them); U.S. v. Malpeso, 115 F.3d 155, 162–63, 47 Fed. R. Evid. Serv. 572 (2d Cir. 1997) (proffered evidence was irrelevant or more prejudicial than relevant); People v. Douglas, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup 1998) (prosecution entitled to instruction that the propriety of a search and seizure is not a question for the jury).

11 See the book and articles by Conrad cited in note 1.

12 Weinstein, note 1, 30 Am. Crim. L. Rev. at 251. Further:

> There is a danger, however. A defendant may so open the door to prejudicial material by the prosecution or so turn a simple issue-of-fact trial into a political debate as to warrant the court's employing a strict view of relevancy even where a reasonable nullification argument exists. Judges will have to use their discretion sensibly under the Rules.

Weinstein practices what he preaches: see, e.g., U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

13 U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

14 Scheflin, 45 S. Cal. L. Rev. at 181, supra.
See U.S. v. Sanusi, 813 F. Supp. 149, 160, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992) (videotape of search was admissible because it permitted nullification argument):

> By inviting CBS to accompany it on its search, the Secret Service may well have provided a basis for a finding of not guilty. The criminal may go free, not because the constable has blundered, but because the Secret Service and CBS have abused criminal process in a way the average citizen may find unacceptable. This practical aspect of trial by jury cannot be ignored.
>
> The court is reluctant in a criminal case to substitute its judgment for a defendant's on the question of whether such evidence is "necessary or critical" to a defense. It is sufficient that a compelling argument of cogency can be made.

15 See, e.g., U.S. v. Moylan, 417 F.2d 1002, 1007 (4th Cir. 1969); U.S. v. Dellinger, 472 F.2d 340, 408, 22 A.L.R. Fed. 159 (7th Cir. 1972); U.S. v. Sepulveda, 15 F.3d 1161, 1189-90, 38 Fed. R. Evid. Serv. 1297 (1st Cir. 1993); U.S. v. Powell, 955 F.2d 1206, 92-1 U.S. Tax Cas. (CCH) ¶50128, 69 A.F.T.R.2d 92-726 (9th Cir. 1991); People v. Douglas, 178 Misc. 2d 918, 680 N.Y.S.2d 145 (Sup 1998).
Only one or two states recognize that trial judges have the discretion to inform a jury of the power to nullify. See, e.g., State v. Mayo, 125 N.H. 200, 480 A.2d 85, 87 (1984). In all other states, however, judges determine the law in the jury instructions and the jury is bound by the instructions to follow the law.

16 See, e.g., People v. Williams, 25 Cal. 4th 441, 106 Cal. Rptr. 2d 295, 21 P.3d 1209 (2001), a case involving removing a juror during deliberations where the juror expressed the view that he would not follow the court's instructions in a statutory rape case. The trial judge in questioning the juror during deliberations found that the juror's reticence came from the defense closing argument. The trial judge told the juror: "You understand that there was an improper suggestion and that it's a violation of the

Rules of Professional Conduct?" *Williams*, 21 P.3d at 1212. There apparently was no objection from the prosecutor at the time the argument was made.

17 See Weinstein, 30 Am. Crim. L. Rev. at 251.
See also People of Territory of Guam v. Sakura, 1996 WL 104533 (D. Guam 1996) (3-judge court), aff'd, 114 F.3d 1195 (9th Cir. 1997) (efforts at jury nullification are common defense techniques in the trial division of the court); U.S. v. Sanusi, 813 F. Supp. 149, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

18 People v. Montanez, 281 Ill. App. 3d 558, 217 Ill. Dec. 459, 667 N.E.2d 548, 553–54 (1st Dist. 1996):

> We do not mean to say we approve of the strategy defense counsel used in this case. In light of *Cronic*, *Strickland*, and *Hattery*, it is a risky business. Better practice requires defense counsel to test the State's proof against the reasonable doubt standard. In that rare case where jury nullification is the only hope, counsel should obtain the defendant's consent to embark on so perilous a strategy, as did the defense lawyer in *Ganus* [People v. Ganus, 148 Ill. 2d 466, 171 Ill. Dec. 359, 594 N.E.2d 211 (1992)].

19 There are no comparable specific provisions of the Code of Professional Responsibility. RPC Rule 1.2, Model Code Comparison & 3.1, Model Code Comparison (1983).

20 U.S. v. Teague, 953 F.2d 1525, 1532 (11th Cir. 1992). See discussion in §§ 9:21- 9:22.

21 Defense counsel also has a duty to dissuade the client from any defense that is virtual suicide in front of the jury. See cases cited supra.

22 *Zal v. Steppe*, 968 F.2d at 934 (concurring opinion):

> As counsel for those accused of a crime, Zal had an obligation to them to present their defense and to present it not halfheartedly, not mechanically, but zealously. The duty of advocacy, the commands of our profession required no less. Zal, accordingly, had the right to bring out the reason for his clients' actions. Even if the reason for the actions did not constitute a good defense under the applicable law, an explanation allowed the jury to see his clients not as monsters mindlessly invading the rights of other, but as human beings.

Weatherall v. State, 73 Wis. 2d 22, 242 N.W.2d 220, 224 (1976):

> Rejecting entrapment as an appropriate theory of the case for the defense, trial counsel instead opted to conduct the trial and made his plea to the jury under a "Good Samaritan" approach. Given the denial of one sale and the admission by his client of the other two sales, counsel sought to increase the possibility of the jury accepting his client's denial as to the first sale by portraying his client as one who had sought only to help someone in trouble and distress. Establishing such intent to help, rather than to profit, would not be a legal defense under the statute defining the crime charged. However, such attempt to put his client in the most favorable light possible, if successful, might incline the jurors to accept, on the issue of credibility, the testimony of the defendant rather than that of the undercover agent as to the first sale, the only one denied by defendant. Our court has taken judicial notice of the fact that juries do, on occasion, temper justice with leniency. As an experienced criminal lawyer, trial counsel was entitled to give weight to such extra-legal possibility. He is no more to be faulted for such exercise of professional judgment than is the defense counsel who, facing formidable adverse facts, advises his client to plead guilty, perhaps on a lesser charge, rather than to go to trial on a plea of not guilty. Later on, post-conviction counsel may not agree with the advice given and followed, but that is always later on.

23 U.S. v. Sams, 104 F.3d 1407 (D.C. Cir. 1996), supra (ineffective assistance claim).

24 D.C. Op. 320 (May 2003).

25 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See generally Ch 10 on ineffective assistance of counsel.

26 *Strickland*, 466 U.S. at 694–95:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

See also Jones v. Jones, 163 F.3d 285, 306 (5th Cir. 1998) (possibility of jury nullification does not make counsel ineffective, looking to this passage from *Strickland*).

27 U.S. v. Gil, 142 F.3d 1398 (11th Cir. 1998); U.S. v. Brown, 983 F.2d 201 (11th Cir. 1993).

28 See, e.g., Collins v. Lockhart, 545 F. Supp. 83, 86–87 (E.D. Ark. 1982), decision rev'd, 707 F.2d 341 (8th Cir. 1983) (defendant was his own worst enemy as a possible witness, and just putting him on the stand would have been worse than hoping for leniency); People v. Nieves, 192 Ill. 2d 487, 249 Ill. Dec. 760, 737 N.E.2d 150 (2000).
And see Anderson v. Calderon, 232 F.3d 1053, 1089–90 (9th Cir. 2000):

> With the amount of solid evidence facing Anderson, Ames's chosen diminished capacity and jury nullification argument is not demonstrably worse than an argument centered on diminished capacity and complete acquittal. But cf. *Capps v. Sullivan*, 921 F.2d 260, 262, 31 Fed. R. Evid. Serv. 1113 (10th Cir. 1990) ("[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy, rather than to raise an entrapment defense that has some support in the evidence.") (emphasis added); *Francis*, 720 F.2d at 1194 ("Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury.") (emphasis added). Ames simply found it "advantageous to his client's interests to concede ... guilt of one of several charges," *see Swanson*, 943 F.2d at 1075-76, and attempted to do so under one of two similarly risky strategies.

29 See, e.g., U.S. v. Sams, 104 F.3d 1407 (D.C. Cir. 1996) (dicta); Sams v. U.S., 1999 WL 680008 (D.D.C. 1999) (not per se ineffective assistance); U.S. v. Horsman, 114 F.3d 822, 47 Fed. R. Evid. Serv. 582 (8th Cir. 1997) (harmless error at best in light of overwhelming evidence of guilt; possibility of jury nullification on retrial would not translate into prejudice, quoting *Gonzalez*, supra (not a "right," much less a "substantial right"); People v. Salem, 2001 WL 1029650 (Mich. Ct. App. 2001) (table); People v. Morris, 209 Ill. 2d 137, 282 Ill. Dec. 753, 807 N.E.2d 377 (2004) (overruled on other grounds by, People v. Pitman, 211 Ill. 2d 502, 286 Ill. Dec. 36, 813 N.E.2d 93 (2004)) ("Defense counsel's decision to employ a nonlegal defense is not, by itself, reason to conclude that counsel's assistance in the case at bar falls under the standard of *per se* ineffective assistance ... ."); Weatherall v. State, 73 Wis. 2d 22, 242 N.W.2d 220, 224 (1976), quoted supra; State v. Lammers, 153 Wis. 2d 398, 451 N.W.2d 805 (Ct. App. 1989) (table, unpublished; text in Westlaw) ("Such a defense, commonly known as 'jury nullification,' is a recognized criminal defense strategy... . That the strategy proved unsuccessful does not transform the decision to pursue it into deficient performance.").
But see U.S. v. Hernandez-Ocampo, 985 F.2d 575 (9th Cir. 1993) (table, unpublished; text in Westlaw) (if jury nullification were the defense here, it would have not been a reasonable one; but apparently none would anyway).
Cf. U.S. v. Steverson, 230 F.3d 221, 2000 FED App. 0303P (6th Cir. 2000) (court noted defense was nullification in face of overwhelming facts; counsel's alleged failures were not prejudicial).

30 Capps v. Sullivan, 921 F.2d 260, 262, 31 Fed. R. Evid. Serv. 1113 (10th Cir. 1990) ("[W]hen a defendant takes the stand in his own behalf and admits all of the elements of the crime, exactly in accord with the court's instructions to the jury, it is surely inadequate legal representation to hope that the jury will ignore the court's instructions and acquit from sympathy rather than to raise an entrapment defense that has some support in the evidence.").

31 U.S. v. Montgomery, 14 Fed. Appx. 613 (6th Cir. 2001) (table, unpublished; text on Westlaw) (sole strategy was one of nullification where elements of crime were not disputed; not clearly erroneous to deny acceptance of responsibility).

32 Jack B. Weinstein, Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice, 30 Am. Crim. L. Rev. 239 (1993).

33 People v. Wilson, 972 P.2d 701, 705–06 (Colo. Ct. App. 1998), as modified on denial of reh'g, (Oct. 29, 1998) (argument should have been avoided, but it was not reversible error where it came in response to defense).

34 Conrad, The Champion at 33, supra.

35 Fed. R. Evid. 401.

36 U.S. v. Sanusi, 813 F. Supp. 149, 21 Media L. Rep. (BNA) 2202 (E.D. N.Y. 1992).

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EXHIBIT 2

People v. Douglas, 178 Misc.2d 918 (1998)
680 N.Y.S.2d 145, 1998 N.Y. Slip Op. 98572

178 Misc.2d 918
Supreme Court, Bronx County, New York.

The PEOPLE of the State of New York, Plaintiff,
v.
O.B. DOUGLAS, Defendant.*
Aug. 25, 1998.

In prosecution for criminal possession of a weapon in the third and fourth degrees, and for criminal possession of handcuffs, the Supreme Court, Bronx County, Massaro, J., held that People were entitled to a **jury** instruction which affirmatively stated that the propriety of a search and seizure was beyond the **jury's** province to decide.

Ordered accordingly.

Attorneys and Law Firms

****145 *918** Legal Aid Society (Dennis Murphy and Michael Raskin, New York City, of counsel), for defendant.

****146** Robert T. Johnson, District Attorney of Bronx County (Lisa Deldin, of counsel), for plaintiff.

Opinion

***919** DOMINIC R. MASSARO, Justice.

[1] The issue presented on this application—the spectre of race-based **jury nullification** having arisen at trial—is whether the People are entitled to a **jury** instruction which affirmatively states that the propriety of search and seizure is beyond the **jury's** province to decide. The Court is duty bound to uphold the law, and the law requires such appropriate instruction.

Factual Settings

O.B. Douglas was arrested and indicted for the crimes of criminal possession of a weapon in the third (Penal Law, Sec. 265.02[4]) and fourth (Penal Law, Sec. 265.01[1]) degrees, and criminal possession of handcuffs (N.Y.Admin.Code, Sec.10–147). Seeking to preclude the introduction of the weapon and handcuffs at trial, Mr. Douglas moved for and was granted a suppression hearing. The hearing testimony indicated that the police, upon observing the vehicle in which Mr. Douglas was a passenger, stopped it for a traffic violation. It was noted that Defendant and the driver were black men, and that the police officers were white. Responding to a request for identification, Mr. Douglas reached into a waist bag he was wearing, exposing a gun; it was seized and Defendant was asked to step out from the vehicle; the handcuffs were recovered upon his being searched.

After scrutinizing the stop for a Vehicle and Traffic Law violation for which a summons was issued (*see, People v. Bernier,* 245 A.D.2d 137, 666 N.Y.S.2d 161 [1st Dept., 1997]; *People v. Watson,* 157 A.D.2d 476, 549 N.Y.S.2d 27 [1st Dept., 1990]), the Court determined that it was not pretextual, as claimed by Defendant, and that the police had not exceeded the scope of proper conduct in halting the vehicle and questioning its occupants (*see People v. Spencer,* 84 N.Y.2d 749, 622 N.Y.S.2d 483, 646 N.E.2d 785 [1995]; *People v. Martinez,* 246 A.D.2d 456, 667 N.Y.S.2d 247 [1st Dept., 1998]; *People v. Washington,* 238 A.D.2d 43, 671 N.Y.S.2d 439 [1st Dept., 1998]; *cf. Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 [1996]). Hence, Mr. Douglas' suppression motion was denied and the gun and handcuffs were admitted into evidence at trial.

During trial, Defendant attempted to focus the **jury's** attention on the circumstances surrounding the viewing of the gun by the police. His strategy was to elicit testimony designed to discredit the testifying officer's recounting of its discovery. Surely this is permissible. The driver of the vehicle then testified for the defense; it was he who brought forth the "race card" vis-a-vis the stop. Thereafter, Mr. Douglas argued for permission to summarize his case by questioning "why they ***920** [the police] stopped the car."[1] The Court would not condone it. Defendant's attempt to discredit the People's witnesses through non-relevant prejudicial inference, the Court ruled, would go beyond the realm of permissibility and contravene the Court's authority to instruct the **jury** on the law. Despite caution, Defendant's summation nonetheless posited that Mr. Douglas was "set up" and "they [the police] stopped the car [because] they just did not like something about the people in the car."[2]

In essence, Mr. Douglas invited the **jury**, comprised largely of African–Americans, directly or indirectly as the case may be, to acquit him solely on the basis that the seizure of the weapon and handcuffs from his person was unlawful and arose out of an impermissible pretextual stop based on racial bias. Invitations such as the instant one have the effect of **nullifying** any finding that the

People have proven beyond a reasonable doubt the elements of a crime(s) submitted to a **jury** for consideration. It is for this reason that the Court, over Mr. Douglas' objection, granted the People's request for a **jury** instruction which affirmatively stated that the Fourth Amendment issue of search and seizure was beyond their province (*see People v.* ****147** *Hamlin,* 71 N.Y.2d 750, 530 N.Y.S.2d 74, 525 N.E.2d 719 [1988]).[3]

Jury Nullification

It is axiomatic in the American justice system that a **jury's** role at trial is limited to finding the facts. **Jury** "[n]ullification occurs when a **jury**—based on its own sense of justice or fairness—refuses to follow the law and convict in a particular case even though the facts seem to allow no other conclusion but guilt" (Weinstein, "Considering **Jury** 'Nullification': When May and Should a **Jury** Reject the Law to do Justice," 30 *Am.Crim.L.Rev.* 239 [1993]; see generally, Courselle, Bench Memorandum, "The First Monday in October" Program, Office of Appellate Defender [1997]). Renewed attention to the doctrine seeks to encourage abdication of the **jury's** primary function to apply the law, that is, the legal definition of a crime to the evidence and to convict if it is satisfied that each element of said crime has been established beyond a reasonable doubt. The Fully ***921** Informed **Jury** Association, for example, has for a decade kept the issue in the public eye. The Association draws supporters from across the political and social spectrums, including:

> [c]onservatives and constitutionalists, liberals and progressives, libertarians, populists, greens, gun owners, peace groups, taxpayer rights groups, home schoolers, alternative medicine practitioners, drug decriminalization groups, criminal trial lawyers, seat belt and helmet law activists, environmentalists, women's groups, anti-nuclear groups, [and] ethnic minorities (Scheflin & Van Dyke, "Merciful **Juries**: The Resilience of **Jury Nullification**," 48 *Wash. & Lee L.Rev.* 165, 176--177 [1991]).

Anti-abortion activists have more recently encouraged **jury nullification** in trials of people engaged in protests at abortion and family-planning clinics (*see United States v. Lynch,* 952 F.Supp. 167 [S.D.N.Y., 1997] [trial judges, like **juries**, have power to engage in **nullification**], *affd.* 104 F.3d 357, *cert. denied* 520 U.S. 1170, 117 S.Ct. 1436, 137 L.Ed.2d 543 [1997]).

Racial Motivations

Much recent debate has centered around issues of racially motivated **jury nullification** (see, e.g., Butler, "Racially Based **Jury Nullification**: Black Power in the Criminal Justice System," 105 *Yale L.J.* 677 [1995]; Leipold, "The Dangers of Race–Based **Jury Nullification**: A Response to Professor Butler," 44 *U.C.L.A.L.Rev.* 109 [1996]; Butler, "The Evil of American Criminal Justice: A Reply," 44 *U.C.L.A.L.Rev.* 143 [1996]; see also, Abramson, "After the O.J. Trial: The Quest to Create Color-blind **Juries**" and Butler, "**Jury Nullification**: Practice for Blacks is Moral and Legal," *Race and Jury at the Crossroads* [Franklin H. Williams Judicial Commission on Minorities, 1996]). Professor Butler provocatively advocates **jury nullification** as a tool of African–American self-determination, an operational strategy to confront what he perceives to be pervasive racial inequities in the criminal justice system. While conceding that "there is no question that **jury nullification** is subversive of the rule of law,"[4] he argues that African–American **jurors** have a moral obligation "to exercise their power in the best interests of the black community" and to acquit in non-violent criminal cases where ***922** the defendant, though factually guilty, is black.[5] This, he maintains, will diminish the racially disparate impact of the criminal law, help bring about beneficial legal reform and improve the African–American communities that are now crippled by excessive imprisonment of their numbers.[6] This position ****148** has come under attack, not only because it encourages **jurors** to disregard the law, but also because it is premised on a rejection of the criminal justice system.[7]

The rhetoric notwithstanding, it may correctly be stated that **nullification** advocates follow in the footsteps of a hallowed tradition, one which reaches back to the earliest days of our Colonial experience. **Juries** at one time explicitly possessed the power to judge the law as well as the facts, and thus to enter a **nullification** verdict.

Hallowed Tradition

The right of trial by **jury** was designed "to guard against a spirit of oppression and tyrannny [*sic*] on the part of the rulers" and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties" (2 Story, *Commentaries on the Constitution of the United States,* 541, 540 [4th ed., 1873]; see also, 4 Blackstone, *Commentaries on the Laws of England* 342 [1769]; *United States v. Gaudin,* 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 [1995]; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491

[1968]). From the very beginning, however, judges exercised considerable power over the prosecution process as a whole and over **juries** in particular. Even following a verdict, a judge could force a **jury** to reconsider, and if its members proved obstinate, fine, imprison or prosecute them on the theory they had violated their oaths (see generally, Lawson, *Lawless **Juries**?, Twelve Good Men and True: The Criminal Trial **Jury** in England, 1200–1800* [Cockburn & Green, eds., 1988]).

Responding to the Crown's increased use of criminal prosecutions as a means of silencing opponents during the political upheavals that rocked England during the 17th Century, ***923** religious and political dissenters began asserting the **jury's** right to judge the legality of the law. This culminated with the ruling in *Bushel's Case* (125 Eng.Rep. 1006 [P.C., 1670]), which effectively insulated the **jury's** decisionmaking from court interference "wherein they resolve both law and fact complicatedly, and not the fact by itself" (at 1013). The opinion, arising from the foreman's *habeas corpus* petition, held that the **jury** could not be punished for acquitting the Quaker William Penn of seditious preaching (of religion), even if the trial judge believed such a verdict contrary to the evidence.

> Although criminal **juries** in England following *Bushel's Case* possessed the raw power to ignore the law as given by the judge, they never acquired the legal right to do so. In America, by contrast, the right of the **jury** independently to decide questions of law was widely recognized until well into the nineteenth century. Not only did **juries** have the right to judge the law, "counsel had the right to argue the law—its interpretation and its validity—to the **jury**" (Note, "Opposing **Jury Nullification**: Law, Policy, and Prosecutorial Strategy" [85 *Geo.L.J.* 191, 198 [1996]]).

English in origin, there evolved in America an undoubted **jury** prerogative-in-fact derived from the power to bring in a general verdict of "not guilty" in a criminal case, non-reviewable and irreversible by the court (*see Standefer v. United States,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 [1980]; *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 [1957]). As Professor Wigmore observed: "The **jury**, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case" (Wigmore, "A Program for the Trial of **Jury** Trial," 12 *Am.Jud.Soc.* 166, 170 [1929]).

"The pages of history shine on instances of the **jury's** exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge" (*United States v. Dougherty,* 473 F.2d 1113, 1130 [Ct. of App., Dist. of Col. Cir., 1972]). What student of the American saga knows not of John Peter Zenger. In 1735, Zenger published the *Weekly Journal,* a New York newspaper, which was highly critical of the royal governor, who promptly shut it down. Arrested on charges of seditious libel, Zenger admitted publishing ***149** the criticism, but stated that what he published was the truth, then not recognized as a legal defense. Despite the judge's instruction, the **jury** refused to enforce a law that made it a crime to criticize the government, thus laying cornerstones of freedom of speech and of a free press.

Nor is there any lack of notable expression(s) from the Framers, Federalists and Anti–Federalists alike, or early prominent ***924** members of the judiciary, in support of the necessity for the practice of **jury nullification** as a protection against the exercise of arbitrary and abusive power—that **jurors** had "a duty to find a verdict according to their own conscience, though in opposition to the direction of the court; that their power signified a right" (*United States v. Dougherty, supra* at 1132).[8] This served as the ultimate protection against tyranny and injustice and was an integral feature of the birth of our nation.[9] As the 19th century dawned, **juries** continued to display the fierce independence exhibited under colonial rule. The wave of confidence generated by the recent victory over England saw Americans of all stations defend the lawmaking function of the **jury** "with an extraordinarily insistent vitality ..." (Howe, "**Juries** as Judges of Criminal Law," 52 *Har.L.Rev.* 582, 582 [1939]; see generally, Scheflin & Van Dyke, "**Jury Nullification**: The Contours of a Controversy," 43 *Law & Contemp. Probs.* 51 [Autumn 1980]).

The clash of contending forces staking out the direction of the government of the newly established Republic was resolved in political terms early on by reforming, but sustaining without radical change, the status of the courts as central to the democratic process for improving the law. Soon, the youthful passion for independence and the casting off the yoke of tyranny stood in sharp contrast to the practical reality that stability was a necessary ingredient for national growth. As time passed, the idea that **juries** were competent to interpret the laws began to recede, reflecting the sentiments of an established nation rather than the spirit of a revolutionary one. This inaugurated a progressive constitutional revolution that has since changed the entire landscape of American law and life, elevating the moral fundamentality of the democratic ***925** order that the value of equality is not mutually exclusive from that of liberty. And while, as a practical matter, **juries** have, and continue to exercise the power to engage in **nullification**, its exercise implicates a

fundamental conflict between the rule of law and the **jury's** historic role as a restraint on the arbitrary power to oppress. Indeed, the democratic purposes initially served by such **juries** have since come to be better served by other democratic institutions.[10]

The Law

The seminal case of *Marbury v. Madison,* 5 U.S. [1 Cranch] 137, 2 L.Ed. 60 [1803] established the rule that "[i]t is emphatically the province and duty of the judicial department ****150** to say what the law is" (at 177). In *United States v. Battiste,* 24 F.Cas. 1042 [2 Sum. 240, No. 14, 545] (Cir.Ct., D.Mass., 1835), Justice Story [at 1043] set forth that "it is the duty of the court to instruct the **jury** as to the law; and it is the duty of the **jury** to follow the law, as it is laid down by the court". This is the modern rule of the **jury** as the trier of fact.

By the end of the 19th century, the **jury** had changed from an intimate institution into a more impersonal arbiter of impartial justice in a more complicated conception of community. And judicial thinking had clearly shifted and conclusively determined it to be "the duty of **juries** in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence" (*Sparf v. United States,* 156 U.S. 51, 102, 15 S.Ct. 273, 39 L.Ed. 343 [1895]).

The question in *Sparf* was whether a court transcended its authority when saying "a **jury** is expected to be governed by law, *and the law it should receive from the court.*" (*Sparf, supra,* at 63, 15 S.Ct. 273.) Justice John Marshall Harlan held that a **jury** has

> the physical power to disregard the law, as laid down to them by the court. But I deny that ... they have the moral right to decide the law according to their own notions or pleasure ... [the] **jury** should respond as to the facts, and the court as to the law.... This is the right of every citizen, and it is his only protection (at 74, 15 S.Ct. 273, 39 L.Ed. 343, quoting ***926** *United States v. Battiste, supra*).

The court criticized **jury nullification** as contrary to the rule of law. *Sparf,* then, settled the issue against a **jury's** right to decide questions of law. The alternative approach, the Court (at 103) intoned, would replace a "government of laws" with a "government of men." Since *Sparf,* it has been a commonplace understanding that criminal **juries** have the power, but not the right, to **nullify** the law before them.[11]

For more than a century, the United States Supreme Court has followed this precedent that the right to decide the law belongs to the court, not to the **jury** (see, e.g., *United States v. Gaudin, supra; Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 [1956]; *Hepner v. United States,* 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 [1909]). **Jury nullification** is "an 'assumption of power which [the **jury** has] no right to exercise' " (*United States v. Powell,* 469 U.S. 57, 66, 105 S.Ct. 471, 83 L.Ed.2d 461 [1984]; quoting *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 [1932]).

> A **jury** has no more '*right*' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power (*United States v. Washington,* 705 F.2d 489, 494 [D.C.Cir., 1983]).

Civic Fragmentation

The idea of deciding cases on the basis of racial politics as opposed to reasonable doubt is not new; however, its modern day proponents advance the logic that if the system routinely fails, here, African–American defendants, then African Americans must abandon the system.[12] This goes beyond the lofty premise of **juror** lenity in refusing to enforce unjust laws or laws that have been unjustly enforced. Race-based **jury nullification** ***927** was a repellant practice when white supremacists on Southern **juries** refused to convict those ****151** accused of violence against African Americans;[13] it is no better practiced by black **jurors**, even if motivated by legitimate anger. There is an unfortunate yet increasing perception that African-American **jurors** vote to acquit defendants for racial reasons. It has a particular resonance in this venue.[14] Racial allegiance, white or black, has no place in a court of law; in the **jury** room, judgment and discretion are inseparable.

American jurisprudence demands equal application of the law; it is the bedrock upon which our system of justice is

premised. The value of **jury nullification**, this "great corrective of law in its actual administration" (Pound, "Law in Books and Law in Action," 44 *Am.L.Rev.* 12, 18 [1910]), pales in comparison when the liberty interest vindicated by the verdict is counter to a commonsense understanding that the pending criminal charge is based neither on principle nor rooted in arbitrary or excessive government; rather, that a defendant is before the bar of justice because of a blameworthy violation of a valid law designed to protect society.

"We categorically reject the idea that, in a society committed to the rule of law, **jury nullification** is desirable or that courts may permit it to occur when it is within their authority to prevent" (*United States v. Thomas,* 116 F.3d 606, 614 [2d Cir., 1997]).

New York Jurisprudence

[2] "While there is nothing to prevent a petit **jury** from acquitting although finding that the prosecution has proven its case, ***928** this so-called 'mercy-dispensing power' ... is not a legally sanctioned function of the **jury** and should not be encouraged by the court" (*People v. Weinberg,* 83 N.Y.2d 262, 268 [1994], quoting *People v. Goetz,* 73 N.Y.2d 751, 752, 536 N.Y.S.2d 45, 532 N.E.2d 1273 [1988], cert. denied 489 U.S. 1053, 109 S.Ct. 1315, 103 L.Ed.2d 584 [1989]; see, also, *People v. Sullivan,* 68 N.Y.2d 495, 510 N.Y.S.2d 518, 503 N.E.2d 74 [1986]; *People v. Mussenden,* 308 N.Y. 558, 127 N.E.2d 551 [1955]; cf. *People v. Tucker,* 55 N.Y.2d 1, 447 N.Y.S.2d 132, 431 N.E.2d 617 [1981]; *People v. Berkowitz,* 50 N.Y.2d 333, 428 N.Y.S.2d 927, 406 N.E.2d 783 [1980]). Furthermore, *Goetz,* at 752, 536 N.Y.S.2d 45, 532 N.E.2d 1273, admonishes that, if the **jury** finds that the state has proved its case beyond a reasonable doubt, it "must" convict.

[3] New York trial courts have a mandated duty to prevent improper and impermissive **nullification** conduct. It has long been recognized in our jurisprudence that "it is [the **jury's**] duty to be governed by the instructions of the court as to all legal questions ... [t]hey have the power to do otherwise, but the exercise of such power cannot be regarded as rightful...." (*Duffy v. People,* 26 N.Y. 588, 593 [1863]; see also, *Safford v. People,* 1 Parker's Cr.Cas. 474 [1854]; *People v. Finnegan,* 1 Parker's Cr.Cas. 147 [1848]).

Furthermore, our *New York Pattern Criminal* ***Jury Instructions,*** in no uncertain terms, informs **jurors** that it is their duty to follow the law as explained by the court (see generally, C.J.I. [N.Y.] 2d ed. [1995–96]; C.P.L. 300.10).[15] If it is established during ****152** *voir dire* that a prospective **juror** is unwilling to do so, that **juror** may be excused for cause (see C.P.L. 270.20).

Conclusion

[4] **Jury nullification**, by definition, is a violation of a **juror's** oath to apply the law as instructed by the Court. Notwithstanding, the power of a **jury** to return a not guilty verdict contrary to the apparent weight of the evidence has been an accepted, indeed cherished, feature of our **jury** system since earliest times. The common law courts recognized that **juries** in criminal cases sometimes exercise discretionary judgment in order to return a general verdict of non-guilt; clearly, in the era following ***929** the Revolution **juries** were routinely instructed that they were not bound by the judge's instruction on the law, but were free to develop their own interpretation of its applicability. **Jury nullification** thus enjoyed an auspicious history well into the last century.[16] This noble doctrine made a great deal of sense at a time when American law was in its infancy and American jurisprudence not yet fully developed.[17]

There is no moral justification in present day America to separate liberty and equality; and "liberty regulated by law is the underlying principle of our institutions" (*Sparf v. United States,* 156 U.S., *supra,* at 103, 15 S.Ct. 273); "[p]ublic and private safety alike would be in peril, if the principle be established that **juries** in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves" (see *Sparf v. United States, supra* at 101, 15 S.Ct. 273). Nor is there a moral responsibility for **jurors** of any race to use **nullification** to reintroduce into the community those whose crimes are destructive of its social fabric, and who otherwise are deserving of conviction under any analysis other than that of proof of guilt beyond a reasonable doubt. **Juries** cannot be "the conscience of the community" (*United States v. Spock,* 416 F.2d 165, 182 [1st Cir., 1969]) by violating their oath to apply the law to the evidence. Historically, the concept of **nullification** was justified solely as a byproduct of the careful defense of other values deemed more fundamental precisely because they proved beneficial to the commonweal. **Nullification** should not, and cannot without greater cost, be transformed into a more robust affirmative grant of power.

Conceptually, **jury nullification** is logically incompatible with applying the law, and to do so diminishes legality by

fostering the perception that individuals can determine the boundaries of lawful conduct. This can only serve to undermine public confidence in the normative effect of rule of law. "Toleration of such conduct would not be democratic ... but inevitably anarchic" (see *United States v. Dougherty, supra* at 1134).

[5] [6] *930 "In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial **jury**" (U.S. Const., Amend. VI [1789]; see also, N.Y. Const., Art. I, Sec. 2). By extension, this right includes the right to a **jury** that is willing to apply the law as instructed by the court (see *Adams v. Texas,* 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 [1980]). In this instance, by charging that, while the credibility of each and every witness is for the **jury** to determine, the lawfulness of police conduct in stopping the automobile in which Defendant was a passenger is not a question of fact for consideration, this Court sought to discourage the **jury** from engaging in a non-legally sanctioned function in reaching its verdict(s). "Due process means a **jury** capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the ****153** effect of such occurrences when they happen" (*Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 [1982]).

The **jury** system is an effort to secure participatory democracy; democratic theory, however, does not countenance extra-legal lawmaking. Political legitimacy suggests that the juryroom is an improper setting to pass judgment on the wisdom of policy choices democratically determined by duly elected representatives. This has no parallel to treating with arbitrary oppression by regal fiat. While in an extraordinary case calling upon high conscience, if at all, the ends of justice may cause **jurors** to consider their own sense of what is just and proper, resulting in a legally indefensible verdict, this is wholly distinct from the court's duty to uphold the law. The very essence of the judicial function is to declare the law's applicability—even if a **juror** does not agree with it.

[7] In a society as multicultural as our own, **jurors** sit not as representatives of discrete groups, but as citizens representing the public interest. It is for this reason that trial courts must insist that **jurors** will consider and decide the facts impartially, especially to forestall favor, that is, to prevent a **juror's** conduct that violates his or her sworn duty to conscientiously apply the law as instructed by the court. Neither democracy nor the **jury** is served by brokering justice based on race.[18]

"Nothing would be more pernicious to the **jury** system than for society to presume that persons of different backgrounds go ***931** to the **jury** room to voice prejudice" (*J.E.B. v. Alabama,* 511 U.S. 127, 154, 114 S.Ct. 1419, 128 L.Ed.2d 89 [1994] [Kennedy, J., concurring]).

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Footnotes

* The herein Defendant was acquitted of all counts; the name is a pseudonym.

1 Tr., July 6, 1998.

2 *Ibid.*

3 "I instruct you that whether the approach and stop of defendant was lawful is not for you to decide. That subject involves a question of law that is not within the province of the **jury** to determine. Your duty as **jurors** is to determine whether the People have proven all of the elements of the crime charged beyond a reasonable doubt" (*People v. Euklin Wright,* 168 Misc.2d 787, 788, 645 N.Y.S.2d 275 [1996]).

4 Butler, "Racially Based **Jury Nullification**: Black Power in the Criminal Justice System," *op. cit.,* at 706; "My goal is the subversion of American criminal justice ..." (*Id.* at 680).

5 *Id.* at 715. "[I]t is the moral responsibility of black **jurors** to emancipate some guilty black outlaws" [*Id.* at 679].

6 Between 1965 and 1992, the arrest rate for African Americans was between four and seven times greater than the arrest rate for whites (see Bureau of Justice Statistics, U.S. Dep't. of Justice, *Sourcebook of Criminal Justice Statistics*

1994, at 378 [1995]).

7 "Black people can 'opt out' of American criminal law" (Butler, Racially Based **Jury Nullification**, *op. cit.,* at 714).

8 John Jay, the first Chief Justice of the United States, stated that the **jury** has the right to judge both "the law as well as the fact in controversy" (*Georgia v. Brailsford,* 3 U.S. 1 [3 Dall.], 3, 1 L.Ed. 483 [1794]).

9 Perhaps the most important reason why early American **juries** were accorded the right to decide questions of law was the central role they had played in opposing the tyrannical rule of the English government in the years leading up to the Revolution. Colonial **juries** regularly refused to enforce the various Navigation Acts, which restricted maritime commerce, or to convict Americans accused of avoiding the imposition of levies. The English responded to these flagrant acts of **jury nullification**, in part, by extending the jurisdiction of the vice-admiralty courts, which functioned without **juries**, and by declaring that colonists charged with treason would be tried in England. These actions caused outrage and constituted one of the major grievances that led to the Revolution. Among the many "injuries and usurpations" enumerated in the Declaration of Independence, King George III was charged with "depriving us in many cases, of the benefits of Trial by **Jury**."

10 "[I]n the colonial era, American **juries** were the governmental bodies most representative of their communities. With independence, state legislatures and other agencies probably represented the whole society better. More democratic lawmaking left little legitimate role for the **jury's** law-intuiting (and law-defying) functions. The democratic purposes initially served by colonial **juries** came to be better served by other institutions" (Alschuler & Deiss, "A Brief History of the Criminal **Jury** in the United States," 61 *U.Chi.L.R.* 867, 917 [1994]).

11 The state constitutions of both Indiana and Maryland yet provide that **jurors** are judges of both the law and facts. **Juries** in those states continue to be instructed on the prerogative to **nullify** the law in criminal cases.

12 To the contrary: seventy-six percent (76%) of African Americans surveyed favored imposing more severe prison sentences as a way to deal with the crime problem (*Sourcebook, op. cit.,* at 172 [Gallup Poll]). Sixty-eight percent (68%) of blacks surveyed said that they would approve of building more prisons so that longer sentences could be given (*Sourcebook, op. cit.,* at 178 [ABC News Poll]). Two-thirds also approved of a "three strikes and you're out" provision which would impose a mandatory life sentence for a third-time violent felon (*Sourcebook, op. cit.,* at 176 [ABC News Poll]). By a two-to-one margin (62% to 31%), black citizens favored treating juveniles who commit crimes the same as adults (*Sourcebook, op. cit.,* at 178 [Gallup Poll]).

13 "[A]lthough the early history of our country includes the occasional *Zenger* trial or acquittals in fugitive slaves cases, more recent history presents numerous and notorious examples of **jurors nullifying**—cases that reveal the destructive potential of a practice ... rightly termed a "sabotage of justice".... Consider, for example, the two hung **juries** in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till ... shameful examples of how **nullification** has been used to sanction murder and lynching" (*United States v. Thomas,* 116 F.3d 606, 616 [2d Cir., 1997]).

14 "The race factor seems particularly evident in such urban environments as [Bronx County], where **juries** are more than 80% black and Hispanic. There, black defendants are acquitted in felony cases 47.6% of the time—nearly three times the national acquittal rate of 17% for all races. Hispanics are acquitted 37.6% of the time. This is so even though the majority of crime victims in the Bronx are black or Hispanic ..." (Holden, Cohen and de Lisser, "Color Blinded? Race Seems to Play An Increasing Role In Many **Jury** Verdicts," *Wall St. J.,* Oct. 4, 1995, at A1).

15 But see, 1995 N.Y. Senate Bill 4157 (218th Session): "An act to amend the criminal procedure law, in relation to a court's charge to a **jury** [that] [u]pon request of a defendant, the court must also state that the **jury** has the final authority to decide whether or not to apply the law to the facts before it, that it is appropriate to bring into its deliberations the feelings of the community and its own feelings based on conscience, and that nothing would bar the **jury** from acquitting the defendant if it feels that the law, as applied to the facts, would produce an inequitable or unjust result." Referred to Senate Committee on Codes and expired therein.

16 The nineteenth century acquittals by northern **juries** in prosecutions under the Fugitive Slave Act of 1850 is, perhaps, our country's more honorable example of "benevolent **nullification**."

17 Historians suggest three reasons for this unique situation: first, the almost total absence of an established legal profession; second, the pervasive influence of natural rights philosophy; and third, the shared experience of living

under—and then rebelling against—a tyrannical form of government (see generally, Alschuler & Deiss, "A Brief History of the Criminal Jury," *op. cit.*).

18 "Race-based decisionmaking ... is wrong because verdicts will inevitably be based on stereotypes that are harmful to all members of the group; wrong because those who are not part of the favored group are treated more harshly for reasons unrelated to their blameworthiness; wrong because it helps polarize a society that is already struggling with racial division; and most tragically, wrong because it raises the flag of surrender in the fight for equality" (Leipold, "The Dangers of Race–Based Jury Nullification," *op. cit.*, at 139).

THE STRATEGIC DEFENSE OF HIGH PROFILE CLIENTS

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THE STRATEGIC DEFENSE OF HIGH PROFILE CLIENTS

Introduction

This discussion assumes that the "notoriety" of either the client or the nature of the case will or already has resulted in substantial media interest.

The Type of Client

- High profile cases can arise either through notoriety or because a celebrity is involved. The type of client is important.
    - A non-celebrity thrust into the public eye will be more willing to take advice and is easier to control.
    - Celebrities and high profile clients are generally more difficult to control at the outset.
- One must address both cases forcefully, but the various types of cases will be handled differently.

Dealing With an Entourage

- Celebrities often are surrounded by people, such as agents and public relations managers. These people generally mean well, but do not always understand how to handle a criminal case.

- The situation is far different from what they are accustomed to handling.

- It is important to make sure that no one on the celebrity's staff speaks to the media about the case, or makes any statement that the celebrity will later regret.

Dealing with the Press Initially

- The press is not always immediately involved, if the case has not yet been made public. However, in some cases the press will be involved from the beginning.

- Regardless of when the media becomes involved, it is essential to limit the information that is initially released.
  - At the beginning, the attorney may not know much anyway.
  - As an attorney, what is said can be deemed an adoptive admission by the client.
  - It is important not to alienate the people, like the prosecutor or the police, that will be involved in the case by saying something inappropriate or premature.

The Media's Involvement

- Some of the most successful cases are the ones that are resolved without the media ever finding out about them.
  - However, this is the exception to the rule; generally speaking, by the time an attorney becomes involved in a case, the media is involved as well.
- In the digital age, news spreads very quickly.

Interacting with the Media

- Very often the initial statement will be a longer version of “no comment”.
    - One should not try and respond to every question, especially at the beginning of a case.
- Attorneys should be wary of the media, and the attention, which can be seductive.

Different Concerns

- People who are not celebrities and are thrust into the media’s attention are often frightened, and easier to manage.
- Celebrities are often worried about endorsements and their public image, and are consequentially much more concerned about managing the media.
    - It is much more difficult to keep them from speaking to the media.

The Media’s Impact on the Case

- The media attention can also have an affect on the case.
- For example, in the Plaxico Burress case, Mayor Bloomberg and District Attorney Robert Morgenthau became directly involved in the media coverage. This changed the entire tone of the case.
    - It may be very tempting to respond to a charge made by the mayor, but one may have to negotiate with these people later.
    - It may be more important to deflect the media.

The Plaxico Burress Case

- The Plaxico Burress case was unique in that the facts were never in dispute. The questions revolved around what would happen, not what had happened.
- This case also involved a mandatory minimum sentence.
    - The outspokenness of public officials made it more difficult to negotiate a soft plea.
- It is very rare for media exposure to help clients.

A Fair Trial

- Negative press does not necessarily preclude a fair trail, as evidenced in the Puff Daddy case, which resulted in an acquittal despite weeks of negative press.
- The common perception is that celebrities get “celebrity justice”.
    - However, the opposite is generally true, as celebrities will be prosecuted in cases that would otherwise not be pursued.
    - Marginal cases can become big cases because of the people involved.

Damage Control

- Credibility in the criminal justice system and the ability to make a quick assessment are factors that contribute to an attorney’s ability to keep a case out of the media.
- It is equally important to try and quash a criminal case early, even after the media has broken the story.

    - It may be possible to demonstrate to the public that in reality there is no case.
- Credibility is very important in these situations.

False Statements

- It is very difficult to stop a media storm, and celebrities, as public figures, have few recourses.
- It is impossible to respond to every false accusation and statement.
- The most important thing is winning the case, not getting good press.

Interviews

- It requires discipline to disregard the press, but it is necessary. It is very easy to say something that will ruin a case.
    - Sometimes it may be necessary to make some comment, even if it is not substantive.
- Interviews with a client are rare, unless there is a particular purpose for the interview.
    - On occasion, there may be a human interest story that can be addressed, and that the client may want to address in order to protect his or her interests.

Substantive Statements

- It is often necessary to make a statement early on, after the case has been exposed, even if little substantial information is given.
- It is very rare to issue a substantive statement.
    - This could violate the Rules of Professional Conduct, and anger the judge, in addition to potentially ruining the case.
    - This is essentially the opening act; it is important to save some ammunition for the actual trial.

Openness with the Media

- There may be cases where it can be beneficial to be a little more open with the press.
- For example, in the Plaxico Burress case, where the facts were not in dispute, it was important to generate some understanding for the client and his side of the story.
    - Perhaps as a result, this case was resolved with a two year plea, even though the mandatory minimum sentence was three and a half years.
- In the Puff Daddy case, a modified gag order was issued and there was no discussion with the media until the case was over.

Taking Control of the Situation

- When dealing with a celebrity client, it may take a while to establish a relationship.
    - However, it is important to establish oneself as the authority in the situation.
    - It is important to be forceful in these cases. It may be better to pass on a case than to give up control.
    - Experience and confidence are very important in taking control of the situation.
- It may take some finesse in dealing with the staff, but it is important that the staff and client understand that not everything can be decided by committee.

Dealing with Sponsors

- One must balance the criminal case with the client's other concerns.
    - Even if the case is won, the client may still lose a great deal if he or she loses sponsors and endorsements.

- Sponsors and advertisers do have legitimate concerns; they have a significant amount of money invested in a person, and they may need to be reassured.
    - Except in the most extreme situations, these cases do often blow over.

Dealing with Sponsors (2)

- While it is not the attorney's job to save sponsorships or endorsement deals, the attorney will be involved in the process.
    - It is important to make sure that no one on the celebrity's staff makes a statement that could be potentially harmful.
- Many people respect the fact that the attorney is performing necessary tasks.

The Inner Circle

- It is very important not to be seduced by becoming part of a celebrity's "inner circle".
    - This can be very difficult at times.
- It is important to assert oneself. This can be challenging, as many of the people surrounding a celebrity will be yes people and the client will not be used to being told "no".
    - However, most celebrities are capable of understanding that the attorney is there to protect them and their interests.

Different Stages

- Even in the investigative stage, it may be beneficial to make a statement that addresses some issues for a case that is already huge.
    - However, it is still not recommended to speak substantively to the media.
    - One also has a legal and ethical obligation to the client not to compromise his or her case.

- A statement may be made following charges, but it won't be substantive. During trial, it is not permitted to make substantive statements.
    - Even after winning a case, statements will still be carefully constructed.

Jury Selection

- It can be a challenge to find jurors that are not biased.
    - State and federal rules regarding jury selection also vary significantly. In state court, one can participate in the *voir dire*. In federal court, this is generally not permitted.
    - However, one can submit questionnaires in some cases.
- Some people do want to be involved in the case simply because of the celebrity. This is not always a good thing.
    - The question is not whether or not the jurors have heard of the client and the case, but whether or not they can be unbiased given what they have already heard and read.
    - It is important to attempt to weed out people who are star struck.

Jury Selection (2)

- It is not necessarily important to find people who will believe the celebrity, as celebrities often do not testify.
- Jurors do not have to like the client, but it is important to make sure that no one hates the client. This is harder in organized crime cases, or cases involving a corrupt politician.

- Jury selection is now a shorter process.
    - Many people are honest in admitting that they cannot be unbiased; some people will use this as an excuse to evade jury duty.

Venue

- It is very difficult to get a change of venue due to bad publicity, as the publicity is not restricted to one geographical area.
- New York City as a venue has its benefits, as it has a diverse population.
- Jury selection is essentially an educated guessing game.

The Celebrity's Emotional State

- In most cases involving high profile celebrities, it is possible to form a bond for the duration of the case.
- One must contend with the emotional ups and downs that arise when the defendant has a great deal to lose.
    - Nobody wants to go to prison, but celebrities in particular have a lot to lose.
    - Celebrities also struggle to deal with the loss of control.
    - It is very difficult to deal with clients' emotional states.

Becoming Star Struck

- Celebrities are impressive in their own right; they are essentially the best in their respective professions.

- However, while it is acceptable to be impressed, one cannot become star struck or allow this to compromise one's judgment.
- While it can be interesting to meet a high profile celebrity, the circumstances under which the meeting occurs are less then desirable; one must contend with the criminal trial.

The Puff Daddy Case

- The risk of Puff Daddy testifying was very low, as there was little chance that he could be caught in a lie.
- Puff Daddy was also a good candidate for testifying as he was articulate, intelligent, and had an incredible story. Moreover, the case did not involve any complicated testimony.
- This was a rather unique situation. Generally, celebrities will not testify.
    - Though this might be considered a performance, it is a very high stakes performance.

The Puff Daddy Case (2)

- Jennifer Lopez was also involved in the Puff Daddy case.
- Eventually, she did not end up testifying, as her testimony did not substantially add to the case.
- Though this may have disappointed the media, it was the right decision for the case.

Cameras

- The idea of cameras in the courtroom does have some merit. However, cameras can alter the way people act.
- There are situations where the public should see exactly what is happening, such as in a corruption or terrorist trial.
- However, a case involving a celebrity is not important enough to warrant cameras.

Post-Verdict Interviews

- Post-verdict interviews of jurors often create problems. In some cases, one is not permitted to talk to the jurors even after the case is over.
- Sometimes it is interesting to hear why jurors came to their conclusions. This can also be educational.
    - Nonetheless, post-verdict interviews often cause more problems than they solve.

Social Media

- Particularly with the advent of social media, it is impossible to control what is being said about a client.
- A bigger issue is the possibility of jurors looking up facts online that have not been admitted into court while serving on a jury.
- Judges are beginning to question and instruct jurors about using the internet and social media.

- No matter what, the focus should be on the trial and nothing else.

Forming a Relationship with the Media

- While the press is generally not kind to a defendant in a criminal case, friendly relationships can develop between the attorney and members of the press without breaking any ethical rules.
- Some reporters have excellent sources, and may be willing to leak information the attorney may not know.
- While one often cannot talk about the case itself, there may be other helpful information, such as what time the trial will actually start, that may be helpful to a member of the media.

Conclusion

Each case is fact specific. Bottom line, keep your eye on the objective. Objective is to do a good job and try to win. The objective is not to make yourself a celebrity.

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New York Employers Face New Sexual Harassment Legislation

In the wake of the #MeToo movement, employers operating in New York will be subject to sweeping new laws aimed at curtailing sexual harassment in the workplace.

By **David E. Schwartz and Risa M. Salins** | May 31, 2018

David E. Schwartz and Risa M. Salins

In the wake of the #MeToo movement, employers operating in New York will be subject to sweeping new laws aimed at curtailing sexual harassment in the workplace. On April 12, Gov. Andrew Cuomo signed into law the New York State Budget Bill for Fiscal Year 2019 (the Executive Budget), which he termed "the nation's most aggressive anti-sexual harassment agenda." In addition, on May 10, Mayor Bill de Blasio signed into law the Stop Sexual Harassment in New York City

Act, described by the city council as critical to creating safe workplaces in New York City. This month's column reviews the new requirements of these New York state and city laws.

Nondisclosure Agreements

Settlement agreements related to sexual harassment claims typically have included nondisclosure clauses restricting disclosure of the terms of the agreement. Pursuant to the Executive Budget, as of July 11, New York state employers may not include confidentiality provisions in settlement agreements for sexual harassment complaints, unless keeping the matter confidential is "at the complainant's preference." If the complainant requests confidentiality, the nondisclosure language must first be provided to all parties. The new law requires a consideration and revocation period, like those required by the Age Discrimination in Employment Act, under which the complainant has 21 days to consider whether or not to accept the confidentiality language, and then has seven days to revoke his or her acceptance before the agreement becomes effective. If the complainant chooses to revoke his or her acceptance, the entire agreement is revoked.

Section 5-336 was added to the New York General Obligations Law and Section 5003-b was added to the New York Civil Practice Law and Rules (CPLR) to reflect these new prohibitions and requirements. Section 5003-b applies to settlements of sexual harassment lawsuits filed in New York courts. By comparison, Section 5-336 appears to apply to settlements of all claims of sexual harassment.

With respect to nondisclosure clauses, employers also should be cognizant that a provision buried in the Tax Cuts and Jobs Act (signed into law on Dec. 22, 2017) added a new Section 162(q) to the Internal Revenue Code, which prohibits employers from deducting costs related to sexual harassment settlements that are subject to nondisclosure agreements.

Mandatory Arbitration

The Executive Budget also adds Section 7515 to the CPLR to prohibit mandatory arbitration clauses from applying to claims or allegations of sexual harassment. This prohibition is effective for contracts entered into on or after July 11, 90 days after enactment of the law. It also purports to declare, as of the effective date, null and void clauses in existing contracts that mandate arbitration of sexual harassment claims. However, the new law does not affect the enforceability of mandatory arbitration clauses to arbitrate other claims. In addition, the law applies only to pre-dispute arbitration agreements. So, parties may continue to agree to arbitrate claims after a dispute arises.

Importantly, for union employers, the terms of a collective bargaining agreement may continue to require arbitration of sexual harassment claims. The new law explicitly states that where there is a conflict with a collective bargaining agreement, the collective bargaining agreement shall be controlling.

Employers will, no doubt, argue that this new prohibition is pre-empted by the Federal Arbitration Act, which establishes Congress' preference for arbitration as a means of dispute resolution and preempts any state rule discriminating on its face against arbitration.

Policies and Training

Both the New York state and New York City laws now mandate that employers have written sexual harassment prevention policies and provide sexual harassment prevention training to all employees on an annual basis. In particular, the Executive Budget amends the New York Labor Law to require all employers to adopt and implement a written sexual harassment policy that meets or exceeds minimum standards to be set by the New York Department of Labor (NYDOL) in consultation with the New York Division of Human Rights (NYDHR). The NYDOL and the NYDHR will create and publish a model sexual harassment prevention guidance document and

sexual harassment prevention policy that will be available on both agencies' websites. Effective Oct. 9. Employers must adopt the model policy or establish a policy that meets or exceeds the model standards.

Employers may use their own sexual harassment policy as long as it includes, among other things, a statement prohibiting sexual harassment; examples of what constitutes unlawful sexual harassment; information about federal and state statutory remedies for victims of sexual harassment; a standard complaint form; a procedure for investigation of complaints; all available administrative and judicial forums in which to raise sexual harassment claims; remedies available to victims of sexual harassment; and a provision stating that retaliation against individuals who complain of sexual harassment or who testify or assist anyone making such a complaint is unlawful.

Effective Oct. 9, the Executive Budget also requires that employers provide sexual harassment prevention training on an annual basis. Once again, the NYDOL and NYDHR will develop a model sexual harassment prevention training program that employers may use to comply with the law. However, employers may use their own training as long the training is interactive and it includes, among other things, an explanation of the legal definitions of sexual harassment and examples, and information on all possible forums for filing complaints and the remedies available.

Notably, effective as of Jan. 1, 2019, all bidders for contracts with New York state, or any state department or agency, must certify that they have implemented a written policy addressing sexual harassment prevention in the workplace and that they have provided annual training for all employees that meet the requirements described above. This requirement is codified in the New York State Finance Law.

There are key additional requirements under the New York City law with respect to policies and training. First, effective April 1, 2019, New York City employers with 15 or more employees must conduct training for all new employees and interns within 90 days of commencement of employment. New York City employers also will be required to obtain signed employee acknowledgments that they received training and maintain

records of the signed acknowledgements for three years. Furthermore, as of Sept. 7, New York City employers will be required to display a new anti-sexual harassment poster created by the New York City Commission on Human Rights in employee breakrooms or other common areas.

Non-Employees

Historically, contractors, vendors and consultants have not been covered by New York State law prohibiting sexual harassment. Effective April 12, the Executive Budget added a new Section 296-d to the New York State Human Rights Law, which makes it unlawful for an employer to permit sexual harassment of such non-employees in the employer's workplace. An employer may be liable if it knew or should have known that a non-employee, such as a contractor, vendor or consultant, was subjected to sexual harassment in its workplace and failed to take immediate and appropriate corrective action.

City Employers

New York City employers should be aware of several significant provisions of the new New York City law which took effect immediately upon Mayor de Blasio's signature. First, the new New York City law clarifies that sexual harassment is a form of discrimination under the New York City Human Rights Law (NYCHRL). Second, employees now have three years (as opposed to one year) to file a claim of gender-based harassment under the NYCHRL. Finally, the NYCHRL's prohibition on gender-based harassment now applies to all New York City employers. Previously, only employers with four or more employees were subject to this provision.

Conclusion

New York employers are advised, at a minimum, to take the following steps to comply with the new state and city sexual harassment laws:

- Review, when they become available, New York state's model sexual harassment prevention policies and training programs.

- Review and revise, as necessary, policies regarding sexual harassment in the workplace, and include references to nonharassment of contractors, vendors and other non-employees.
- Prepare to provide sexual harassment training for employees and managers on an annual basis.
- Train human resources professionals and in-house counsel about nondisclosure provisions in settlement agreements relating to sexual harassment claims.
- Review arbitration agreements and programs to determine if changes are required with respect to arbitration of sexual harassment claims.
- For New York City employers, reconcile differences in the requirements under state and city laws so that training programs incorporate all rules and parameters set forth under both state and city laws.

—Grace Jun, an associate at the firm, assisted in the preparation of this article.

David E. Schwartz is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom. Risa M. Salins is a counsel at the firm.

How common is sexual misconduct in Hollywood?

A USA TODAY SURVEY OF 843 WOMEN IN THE ENTERTAINMENT INDUSTRY FOUND 94% SAY THEY'VE EXPERIENCED HARASSMENT OR ASSAULT.

Maria Puente and (/staff/1006/maria-puente)

Cara Kelly (/staff/10047446/cara-kelly), USA TODAY

Published 3:36 p.m. ET Feb. 20, 2018 | ***Updated 10:09 a.m. ET Feb. 23, 2018***

The first number you see is 94% — and your eyes pop with incredulity.

But it's true: Almost *every one* of hundreds of women questioned in an exclusive survey by USA TODAY say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

For months now we've all been hearing the horrifying stories of abuse from marquee names like Rose McGowan (https://www.usatoday.com/story/life/people/2017/10/29/harvey-weinstein-scandal-rose-mcgowan-talks-refusing-1-million-hush-money/811206001/) and Gwyneth Paltrow (https://www.usatoday.com/story/life/movies/2017/10/10/angelina-jolie-gwyneth-paltrow-say-weinstein-harassed-them-too/750451001/) and Ashley Judd (https://www.usatoday.com/story/life/people/2017/12/15/peter-jackson-harvey-weinstein-told-me-not-cast-ashley-judd-mira-sorvino-lotr/955282001/) and Salma Hayek (https://www.usatoday.com/story/life/people/2017/12/13/salma-hayek-harvey-weinstein-my-monster-too/948605001/), about what powerful men in Hollywood, like movie mogul Harvey Weinstein (https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/), allegedly did to them and other women over decades.

Unwanted sexual comments and groping. Propositioning women. Exposing themselves. Coercing women into having sex or doing something sexual. And, especially pertinent to showbiz, forcing women to disrobe and appear naked at an audition without prior warning.

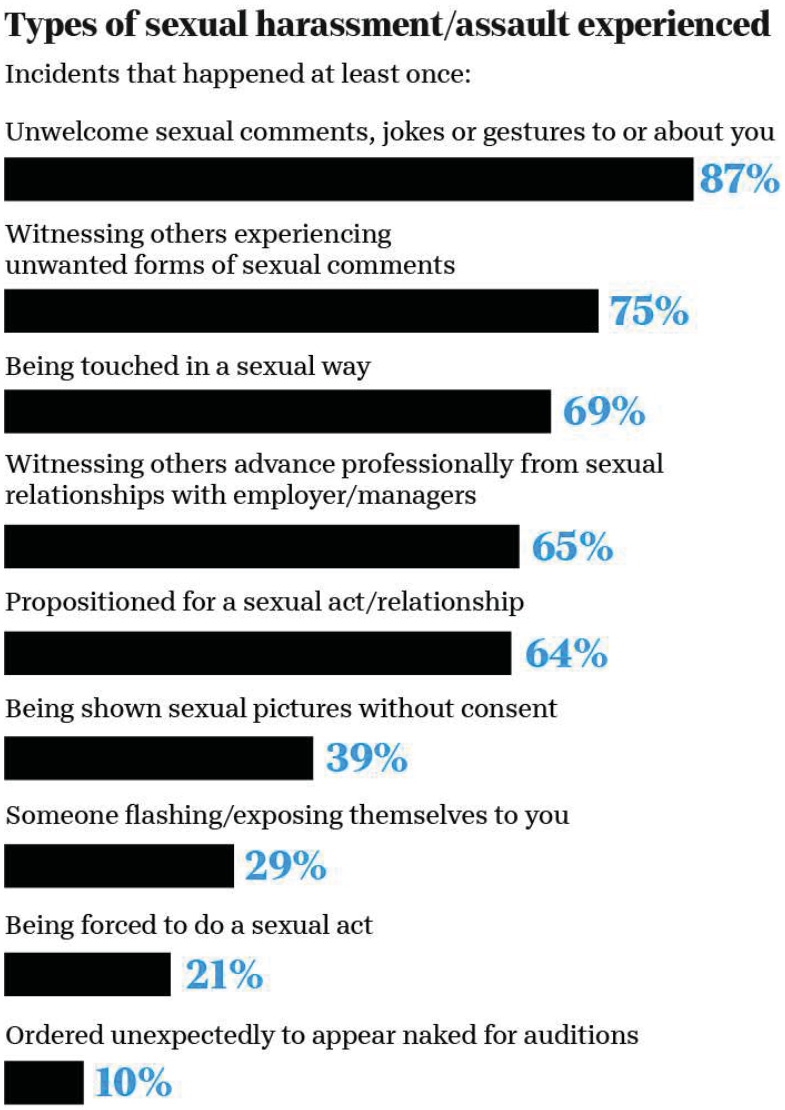
It's been deeply disturbing reading, but so far the powerful stories of accusers outnumber plain, hard facts about the extent of the problem in Tinseltown. Until now.

Working in partnership with The Creative Coalition (http://thecreativecoalition.org/home/about/), Women in Film and Television (https://www.wifti.net/) and the National Sexual Violence Resource Center, USA TODAY

surveyed 843 women who work in the entertainment industry in a variety of roles (producers, actors, writers, directors, editors and others) and asked them about their experiences with sexual misconduct.

The results are sobering: Nearly all of the women who responded to the survey (94%) say they have experienced some form of harassment or assault, often by an older individual in a position of power over the accuser.

Worse, more than one-fifth of respondents (21%) say they have been forced to do something sexual at least once.



Only one in four women reported these experiences to anyone because of fear of personal or professional backlash or retaliation. This reporting rate holds true for all forms of misconduct addressed in the survey, including being forced to do something sexual.

Of those who did report their experiences, most say reporting did not help them; only 28% say their workplace situation improved after reporting.

One surprising finding: Even though America has been arguing about workplace sexual harassment ever since the Anita Hill-Clarence Thomas Supreme Court hearings in 1991, more than one-third of women surveyed weren't even sure that what happened to them was sexual harassment.

Still, even though the survey shows that older and more experienced women have been subjected to more incidents of sexual misconduct, younger women with less than five years of experience in the industry are more likely to blow a whistle on misconduct.

And that suggests there's a chance the status quo — misconduct allowed to flourish because few complain and no one in authority does anything about it — might change in the future as younger women increasingly enter the entertainment workforce and begin asserting influence.

> The National Sexual Violence Resource Center (https://www.nsvrc.org/), which maintains a large library of related surveys on the subject of workplace sexual harassment, says USA TODAY's survey is a first for its focus on Hollywood and for its comprehensiveness.

As with most surveys, there are limitations that could affect interpretations. It was conducted online between Dec. 4, 2017, and Jan. 14 after emails were sent to members of The Creative Coalition and Women in Film and Television inviting them to participate. As a self-selected sample of respondents, it is not scientifically representative of the entire industry, let alone the broader national population of women working in all industries.

Thus, says Anita Raj, director of the Center for Gender Equity and Health at the University of California, San Diego's medical school (http://gph.ucsd.edu/people/core/Pages/raj.aspx), the survey should be treated with some caution. But she believes that the results overall are "credible and important" and that people should pay attention.

"The percentages (in USA TODAY's survey) are higher than what we typically see for workplace abuses, but we know there is variation by the type of workplace," Raj says. "But it makes sense to me that we would see higher numbers (in the entertainment industry)," where the "casting couch" has prevailed for decades and is considered "normal."

Further reading:: USA TODAY's sexual harassment in Hollywood survey methodology explained (https://www.usatoday.com/story/life/people/2018/02/20/usa-today-sunshine-project-methodology-explained/310757002/)

Women may not always know the line between the demands of showbiz and what constitutes sexual harassment, she says. In fact, Raj says, kissing someone without their consent is actually a crime (http://statelaws.findlaw.com/california-law/california-sexual-assault-laws.html) in California, which, she notes, once happened on live TV in front of millions: when Adrien Brody, who won the best-actor Oscar in 2003, grabbed presenter Halle Berry and dip-kissed her at the podium before his acceptance speech. She was not happy, she acknowledged years (https://www.thewrap.com/halle-berry-adrien-brody-kiss-wwhl/)later, but everyone else just laughed.

"Yes, I'd like to see more solidity in the scientific aspects of how the data was collected. But 94% does not seem shocking. It says this is ubiquitous in Hollywood," Raj says. "There is a lack of clarity on what constitutes professional interactions in this (Hollywood) context. So it wouldn't surprise me if in fact it *were* 94%."

The 94 Percent

About this project

In October 2017, women courageously began speaking out about sexual misconduct by men in Hollywood. To continue this movement in 2018 and beyond, USA TODAY is taking an in-depth look at the issue of sexual harassment and assault in the entertainment industry. Our exclusive survey in partnership with The Creative Coalition, Women in Film and Television and the National Sexual Violence Resource Center found that 94% of hundreds of women questioned say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

Further reading

Our survey methodology, explained: We wanted to quantify the pervasiveness of sexual harassment in Hollywood, in the hope of promoting change. Here's how we did it.

She wanted a Hollywood career. Her agent wanted sex. Four women share their #MeToo stories.

'Death by a thousand cuts': How minor incidents of harassment create toxic environments for women.

Coming soon

We'll examine how to fix a broken system. Mounting allegations have forced the top unions, trade groups and studios to re-examine their policies surrounding sexual harassment and assault. We assess what

What kind of misconduct is happening?

Most often, it's someone making unwelcome sexual comments, jokes or gestures: 87% of respondents say this has happened to them at least once. Also, 69% say they've been groped (slapped, pinched or brushed in a sexual way) at least once, and 64% say they have been propositioned for sex or a relationship at least once.

"It happens so frequently that it's just the functioning normal," says a camera operator in her early 40s. "For me, this includes everything from misogynistic or sexual comments made over a headset while working, to blatant grabbing to comments about my body. I've spent the last 20 years accepting it as the price of doing business in a 'man's job.' "

Far fewer respondents say they've been shown sexual pictures without consent (39%) or have been on the receiving end of someone

Many men wore Time's Up pins to the Golden Globe Awards and other red carpet events to show their support for the protests against sexual misconduct.

(Photo: Dan MacMedan, USA TODAY)

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exposing themselves (29%).

What can happen in a Hollywood audition?

A small but still significant number (10%) of the women in the survey say they have been forced to appear naked — unexpectedly — during auditions or in the course of their professional work at least once.

> Jennifer Lawrence has described how, when she was just starting out, a female producer insisted she do a nude lineup with other nude women (https://www.usatoday.com/story/life/people/2017/10/17/jennifer-lawrence-hollywood-elle-women-in-film/770986001/) during an audition to shame her into losing weight.

And Melissa Gilbert has said she once ran out of an audition in tears because a director intentionally tried to humiliate and degrade her by making her do a "dirty" sex scene (https://www.usatoday.com/story/life/people/2017/11/21/melissa-gilbert-says-oliver-stone-humiliated-her-in-audition-for-the-doors/884074001/).

"There are also little ways women get manipulated into showing more of their bodies on camera," says a female actor in her early 40s. "Like, I had a friend who was on an HBO show and the producers called her the *night before* she's supposed to start shooting and tell her that if she didn't do full frontal nudity (which they didn't state that they expected at her audition), they would demote the role from a recurring to a one-time guest star."

Where does misconduct happen?

More than one-third (35%) of respondents say they have been asked to hold work activities or meetings in inappropriate environments such as hotel rooms or bedrooms. Recall that many of Weinstein's accusers asserted that sexual misconduct took place after he lured them to hotel rooms on the pretext of a business meeting.

"My boss took me to dinner to apologize for being incredibly insulting," says a producer in her early 60s. "After dinner he told me to come back to the studio but instead took me to his apartment (that was behind

the studio). He then asked me to give him (oral sex). I refused. To which he said, 'Why do you think I took you to dinner?' "

Almost every one of hundreds of women questioned in an exclusive survey by USA TODAY say they have experienced some form of sexual harassment or assault during their careers in Hollywood.

(Photo: Kirby Lee, USA TODAY Network)

How many women are expected to trade sex for advancement?

One-fifth (20%) of respondents say they have been put in a quid pro quo position: provide sexual acts with the implicit or explicit promise of promotions or other forms of career advancement. Also, 65% of respondents say they witnessed others advance professionally as a result of sexual relationships with employers or managers.

“After a job interview over lunch, my potential new boss walked me to my car and put his arm around my waist and pulled me very close to him," says a writer in her late 40s. "I pushed him away and said I'm not interested in this (job). I came home and cried. I really thought I was being interviewed for a partnership role with equity."

Many of Hollywood's women, including Mariah Carey, America Ferrera, Natalie Portman, Emma Stone and Billie Jean King, wore black to the 75th Golden Globe Awards as a show of solidarity with the Time's Up movement.

(Photo: Dan MacMedan, USA TODAY)

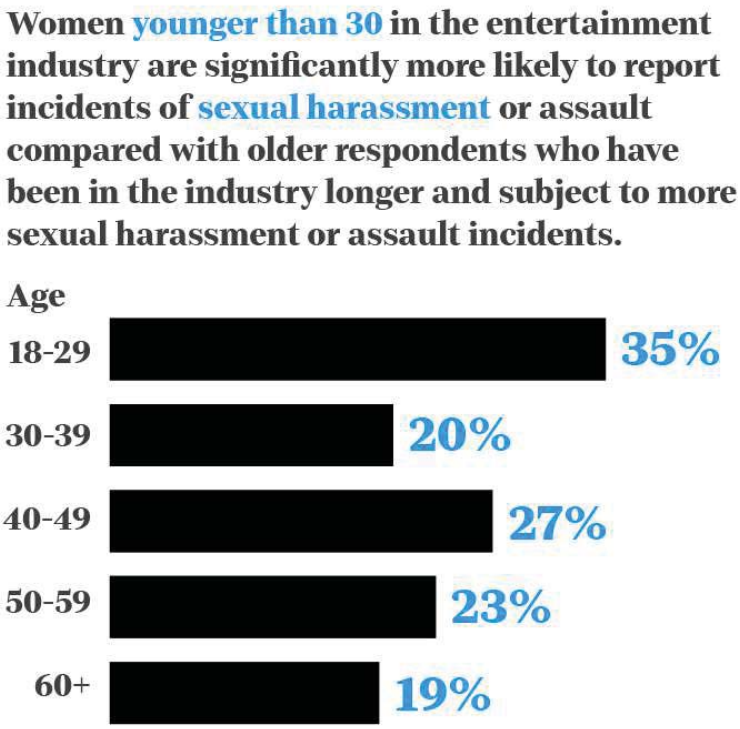
Are women more likely to encounter harassment with age and experience?

More women older than 40 say they were asked to hold meetings in hotel rooms (41% of age 40 to 49) than women younger than 30 (31%).

Similarly, those with more than 20 years experience were more likely to say they were put in a sex-for-advancement position (28%) than women with less than five years in the industry (11%).

How do age and experience influence whether misconduct is reported?

Women younger than 30 were more likely to report (35%) than those older than 60 (19%). Women with less than five years experience were more likely to report (32%) than those with more than 20 years (24%).



Why don't women report misconduct?

Most sexual misconduct goes unreported largely out of fear. But 40% of respondents say they did not trust the system. More than one-third — 34% — weren't even sure what happened to them amounted to sexual harassment, and 32% say they had no evidence so it was their word against the accused. And 20% say they felt shame.

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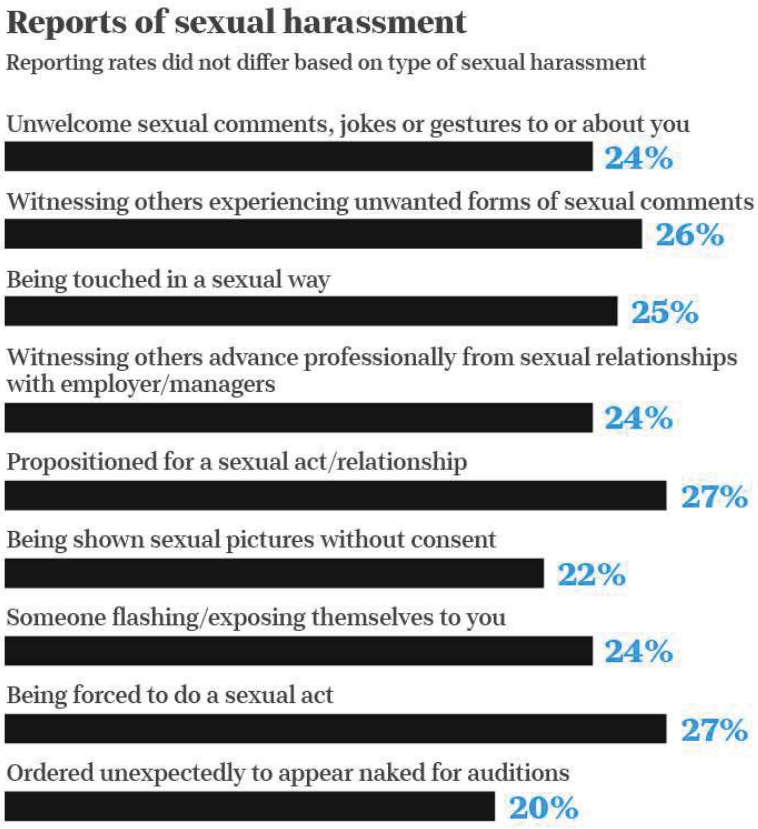
"On countless occasions, I have been in a position at events with clients, where either the client or a member of the client's team has made sexually explicit comments, sexual advances and/or touched my body without consent," says a publicist in her early 40s. "These assailants seem confident enough to know they can become predators without repercussion."

Often, she says, there are no human resources departments working with producers or directors to take a complaint. As a contract worker, her only "professional exit" option in these situations is to wait out the end of her contract without renewal.

"Being in a line of work that obtains clients through word-of-mouth makes me reluctant to speak (about) these sexual harassment/assault experiences for fear of losing clients or collaborations with other firms/companies," she says.



What happened after misconduct was reported?

Of those few who reported misconduct, the result was most often a warning or reprimand (32%) or removal of the harasser (23%). A fraction (8%) of respondents say they were fired after reporting and 4% say there was a settlement in their case. And zero cases were prosecuted.

Also, a quarter of the respondents (24%) say they left their companies specifically because of sexual misconduct incidents.

"There was one specific instance where I reported a horrible incident of harassment to superiors and the male boss of the man who harassed me told me that 'he wouldn't do such a thing' and stopped replying to my emails," says a director in her early 30s. "Women superiors, though more sympathetic, implied nothing more could be done. I simply couldn't keep working in an environment that would be both physically and mentally unsafe for me."

Who are the assailants?

They're male, older and for the most part more powerful than their accusers. About one-third (29%) were directors, agents, producers or someone else in an authority position as the industry defines it. About one-quarter (24%) were peers or co-workers, and one-fifth (20%) were supervisors or senior managers. Less than 10% were influential individuals in the industry, such as celebrities, and few were in a lower position than the accuser (3%).

THE HARVEY WEINSTEIN EFFECT

Tracking the many men accused of sexual misconduct since the scandal broke

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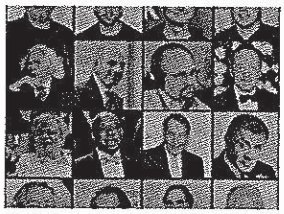
After Weinstein: More than 100 high-powered men accused of sexual misconduct

Editors, USA TODAY Published 4:13 p.m. ET Nov. 22, 2017 | **Updated 9:25 a.m. ET Jan. 30, 2018**



(Photo: AP, Getty Images)

Corrections & Clarifications: Former CNN producer Teddy Davis has been removed from this list. He was accused of inappropriate behavior, according to CNN.

Since the allegations of sexual abuse by Hollywood producer Harvey Weinstein surfaced on Oct. 5, women have been stepping forward to publicly share their stories of sexual misconduct.

Although many of the accusations originally focused on Hollywood, more than 100 high-profile men across industries — including tech, business, politics and media — have since faced claims ranging from sexual harassment to rape (/story/news/nation/2017/11/17/americans-agree-sexual-harassment-problem-they-just-dont-always-agree-what/864621001/).

INTERACTIVE CALENDAR: The near daily onslaught of men accused (/pages/interactives/life/the-harvey-weinstein-effect/)

Below is a list (organized alphabetically) of powerful men who have been accused since the Weinstein scandal broke: (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Ben Affleck

The actor and director was accused of groping (/story/life/movies/2017/10/10/rose-mcgowan-calls-out-ben-affleck-his-harvey-weinstein-statement-you-lie/752025001/) MTV host Hilarie Burton during a 2003 appearance on *Total Request Live*. He issued an apology on Oct. 11, tweeting (https://twitter.com/BenAffleck/status/918166049501208576), "I acted inappropriately toward Ms. Burton and I sincerely apologize." His apology came a day after he condemned Weinstein's behavior.

Tom Ashbrook

The host of National Public Radio program *On Point* was suspended following allegations (/story/life/2017/12/11/veteran-npr-host-tom-ashbrook-suspended-alleged-sexual-misconduct/940903001/) including he engaged in "creepy" sex talks and gave unwanted hugs, neck and back rubs to 11 mostly young women and men who worked on the show. In a statement, Ashbrook said he is sure "once the facts come out that people will see me for who I am — flawed but caring and decent in all my dealings with others."

Gavin Baker

The technology fund manager at Fidelity Investments was accused by multiple employees of harassment, most notably a female equity-research associate who claims she was sexually harassed by Baker and filed a complaint, reports *The Wall Street Journal* (https://www.wsj.com/articles/star-fidelity-manager-gavin-baker-fired-over-sexual-harassment-allegations-1507841061). An attorney for the woman claimed Baker was fired by Fidelity, but Baker — who said in a statement he "strenuously" denies any allegations — claims he left the company "amicably."

444 Ken Baker

The E! News correspondent has been accused by two women of harassment, including an intern who claims he kissed her without consent in 2011, reports *The Wrap* (https://www.thewrap.com/ken-baker-e-news-sexual-harassment-from-an-unwanted-kiss-to-a-text-about-a-sex-toy/). E! News said Baker will remain off the air while it investigates. "I am very disturbed by these anonymous allegations, which make my heart ache. I take them very seriously," said Baker in a statement to *The Wrap*.

Mario Batali

The renowned chef said he was stepping down from his company and TV show indefinitely (/story/money/2017/12/11/mario-batali-sexual-harassment/939785001/) following accusations of sexual harassment by mutiple women. "I take full responsibility and am deeply sorry for any pain, humiliation or discomfort I have caused to my peers, employees, customers, friends and family," said Batali in a statement.

Randy Baumgardner

A former legislative intern told NPR affiliate KUNC (http://www.kunc.org/post/colorado-senators-baumgardner-and-tate-named-allegations-sexual-harassment) of multiple uncomfortable encounters with Republican Colorado state Sen. Randy Baumgardner during the 2016 legislative session. She has filed a formal complaint. The report also cites six unnamed lobbyists and staffers who say they avoid the senator while at work. Baumgardner denied wrongdoing.

RELATED: At least 40 state lawmakers accused of sexual misconduct in past year, USA TODAY Network investigation finds (/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001/)

Eddie Berganza

Four women accused the DC Comics editor of sexual harassment in a piece published on *Buzzfeed* (https://www.buzzfeed.com/jtes/dc-comics-editor-eddie-berganza-sexual-harassment?utm_term=.ayyE6LdGq#.kl0PMgLqK). Days later, Warner Bros. and DC Comics fired him, reports *Entertainment Weekly* (http://ew.com/books/2017/11/13/dc-comics-fires-editor-eddie-berganza-over-sexual-harassment-accusations/).

John Besh

Chef John Besh attends the Supper to benefit the Global Fund to fight AIDS in New York. Besh is stepping down from the restaurant group that bears his name after a newspaper reported that 25 current or former employees of the business said they were victims of sexual harassment. *(Photo: Brad Barket/Invision/AP)*

Twenty-five women have said they were sexually harassed (by John Besh or other male employees) while working at one of the celebrity chef's (http://www.nola.com/business/index.ssf/2017/10/john_besh_restaurants_fostered.html#incart_special-report) restaurants. Besh stepped down from Besh Restaurant Group (http://www.nola.com/business/index.ssf/2017/10/john_besh_restaurants_fostered.html#incart_special-report) on Oct. 23.

"I have been seeking to rebuild my marriage and come to terms with my reckless actions," he wrote in a statement (http://www.nola.com/business/index.ssf/2017/10/statements_by_john_besh_and_hi.html). "I also regret any harm this may have caused to my second family at the restaurant group, and sincerely apologize to anyone past and present who has worked for me who found my behavior as unacceptable as I do."

Stephen Bittel

Florida Democratic Party Chairman Stephen Bittel has been accused of sexually inappropriate comments and behavior toward a number of women. Bittel resigned.

Stephen Blackwell

Billboard magazine executive Stephen Blackwell was accused of sexual harassment by one woman. He has resigned from the magazine.

David Blaine

In a piece published by *The Daily Beast (https://www.thedailybeast.com/exclusive-former-model-accuses-david-blaine-of-rape)*, model Natasha Prince claims the magician raped her in 2004 shortly after her 21st birthday. Prince reported the incident to London police, and investigators contacted Blaine's lawyer, Marty Singer, to return to the United Kingdom for an interview, said the report. In a statement to *The Daily Beast* and ABC News (https://twitter.com/DanLinden/status/921119602872082432), Blaine's attorney denied the allegations (/story/life/people/2017/10/20/david-blaine-denies-allegation-he-raped-model-2004-natasha-prince/783294001/).

Sepp Blatter

Former FIFA president Sepp Blatter gives an interview to news agencies on April 21. *(Photo: Michael Buholzer, AFP/Getty Images)*

Hope Solo, the former goalkeeper for the U.S. women's national soccer team, accused the former FIFA president (/story/sports/soccer/2017/11/11/hope-solo-says-blatter-grabbed-her-he-calls-it-ridiculous/107577500/) of grabbing her rear during a soccer ceremony. Blatter told the AP the accusation is "ridiculous."

Raul Bocanegra

The California assemblyman announced Nov. 20 he will not seek re-election following accusations of harassment from six women, reports the *Los Angeles Times* (http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-assemblyman-raul-bocanegra-announces-he-1511198136-htmlstory.html). Bocanegra cited "persistent rumors and speculation" in his decision not to serve another term.

George H.W. Bush

Former Republican president George H.W. Bush has been accused by seven women (/story/news/politics/2017/11/16/report-seventh-woman-accuses-george-h-w-bush-groping-her-during-re-election-campaign/871793001/) of grabbing their butts. One of the women says she was 16 at the time (/story/news/politics/2017/11/13/george-h-w-bush-apologizes-after-woman-accuses-him-groping-her-when-she-16/858476001/). After the initial report Oct. 25, a Bush spokesman issued a statement of apology, saying "on occasion, he has patted women's rears (/story/news/politics/onpolitics/2017/10/25/president-george-h-w-bush-apologizes-actress-who-alleged-improper-touching/797846001/)" and it was never meant to cause offense.

Louis C.K. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

The actor and comedian was accused of sexual misconduct by five woman in an exposé published by *The New York Times* (https://www.nytimes.com/2017/11/09/arts/television/louis-ck-sexual-misconduct.html?rref=collection%2Fsectioncollection%2Farts&action=click&contentCollection=arts&region=rank&module=package&version=highlights&contentPlacement= on Nov. 9. Among the claims, comedian Dana Min Goodman alleged C.K. exposed himself and started masturbating in front of her and fellow comedian Julia Wolov in his hotel room during a comedy festival in 2002. C.K. admitted to committing the acts described in the *Times* piece. "These stories are true," he wrote in a statement released by his publicist, Lewis Kay, on Nov. 10. C.K. has since lost a host of jobs, including his gig with the upcoming *Secret Life of Pets* sequel.

Nick Carter

Melissa Schuman, formerly of the pop group Dream, accused Backstreet Boys' Nick Carter on Nov. 2 of raping her (/story/life/people/2017/11/22/nick-carter-denies-melissa-schuman-rape-allegations/888800001/) when she was 18. Carter denies the allegations.

Giuseppe Castellano

Penguin Random House art director Giuseppe Castellano was accused by one woman of sexual harassment. Penguin Random House is investigating. Castellano has not commented.

John Conyers

Facing a rising chorus of voices demanding he step down because of sexual harassment claims, Rep. John Conyers Jr., D-Mich., retired on Dec. 5 (/story/news/politics/2017/12/05/john-conyers-announcement/922417001/) from the seat he has held for more than five decades, a swift and crushing fall from grace for a civil rights icon and the longest-serving active member of Congress. Conyers has been accused of sexual harassment toward staffers in his office and has settled at least one claim. He has denied the allegations, even the one he settled. Conyers said, "They're not accurate, they're not true and they're something I can't explain where they came from."

David Copperfield

The illusionist was accused by Brittney Lewis (/story/life/people/2018/01/24/david-copperfield-calls-metoo-movement-crucial-but-warns-new-allegations/1064051001/) of drugging and sexually assaulting her when she was 17. Lewis told The Wrap the incident happened after she competed in a modeling contest where Copperfield, then 32, was a judge. Before the story published, Copperfield released a statement saying he supports the Me Too movement but cautioned against rushing to judgment about false allegations.

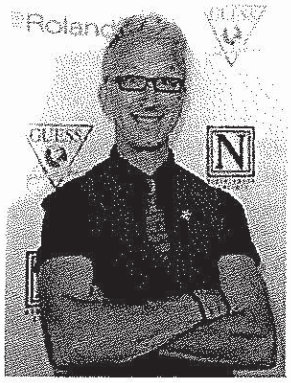
Tony Cornish

Minnesota Republican state Rep. Tony Cornish announced on Nov. 21 that he would resign after being accused of inappropriate behavior by female lobbyist Sarah Walker and Rep. Erin Maye Quade. Cornish said in a statement he had reached an agreement in principle with Walker, who told Minnesota Public Radio News (https://www.minnpost.com/politics-policy/2017/11/amid-sexual-harassment-allegations-sen-dan-schoen-and-rep-tony-cornish-resig) that Cornish had propositioned her for sex dozens of times and once forced her into a wall in an attempt to kiss her. Cornish said the agreement calls for him to apologize and resign. Quade produced texts in which Cornish makes inappropriate comments about her appearance.

Eric Davis

The former NFL player was suspended by ESPN (/story/sports/nfl/2017/12/12/donovan-mcnabb-eric-davis-suspended-espn-investigates-sexual-harassment-allegations-nfl-network/943898001/) after he was named in a sexual misconduct lawsuit over claims while he was employed by NFL Network. Davis has yet to comment on the claims.

Andy Dick



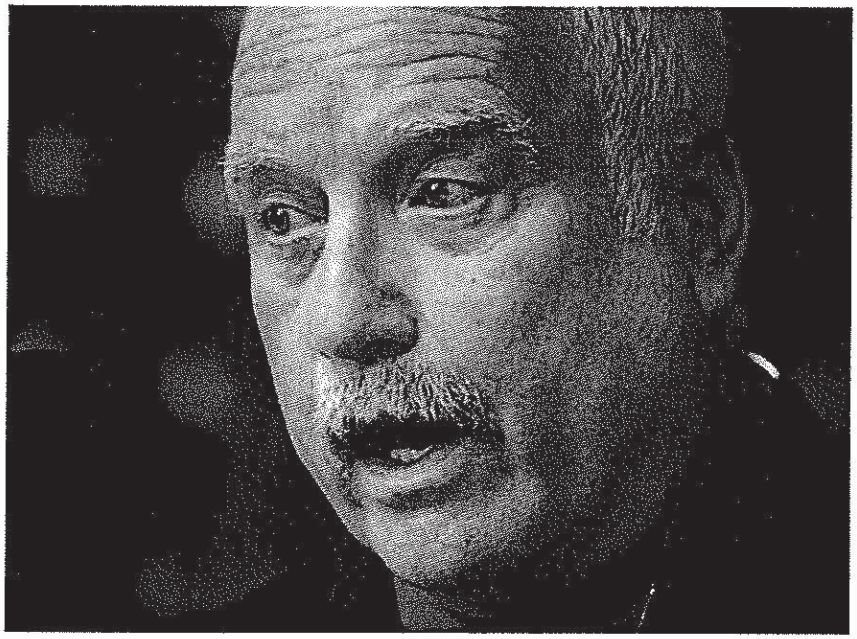
Actor and comedian Andy Dick has been fired from his role in the film 'Raising Buchanan' after he was accused of "groping people's genitals, unwanted kissing/licking and sexual propositions of at least four members of the production on the set," according to 'The Hollywood Reporter.' Dick denied groping claims, but admitted to licking and propositioning people. *(Photo: Kevork Djansezian, Getty Images)*

The actor and comedian (*Road Trip*), was accused of "groping people's genitals, unwanted kissing/licking and sexual propositions of at least four members of the production," on the set of the independent feature film *Raising Buchanan*, according to a report from *The Hollywood Reporter* (http://www.hollywoodreporter.com/rambling-reporter/andy-dick-fired-movie-sexual-harassment-claims-1053162). In an interview with the news outlet Oct. 30, Dick denied the groping claims, but admitted to licking and propositioning people. He has since been fired from his role in *Buchanan*, and was let go from a separate film (http://www.vulture.com/2017/11/andy-dick-fired-from-another-film-for-groping-and-harassment.html) for similar behavior.

Michael Douglas

Author and journalist Susan Braudy claims the actor harassed her (/story/life/people/2018/01/19/michael-douglas-accused-sexual-misconduct-writer-susan-braudy-appalled/1047226001/) while she worked at his production company, Stonebridge Productions. Braudy told *The Hollywood Reporter* (https://www.hollywoodreporter.com/features/michael-douglas-alleged-harassment-media-metoo-moment-1075609) Douglas made sexually charged comments and masturbated in front of her during a private script meeting. Last month, Douglas gave a preemptive interview (/story/life/people/2018/01/10/michael-douglas-denies-sexually-harassing-blackballing-former-employee-complete-lie/1019810001/) denying ever harassing any employees after *THR* contacted him about the story.

Richard Dreyfuss



A writer who worked for actor and political activist Richard Dreyfuss said he sexually harassed her for years and exposed himself to her in a studio lot trailer when she worked for him in the '80s. Jessica Teich told the 'New York Magazine' that the actor made continual, overt and lewd comments and invitations after they met at a theater where she worked and Dreyfuss appeared. Dreyfuss denied the actor ever exposed himself to Teich but acknowledged to other encounters he now realizes were inappropriate. *(Photo: Manuel Balce Ceneta, AP)*

Actor Richard Dreyfuss (/story/life/people/2017/11/10/days-after-his-sons-sexual-assault-reveal-richard-dreyfuss-denies-harassing-l-a-writer/854122001/) (*Jaws*, *Mr. Holland's Opus*) was accused on Nov. 10 of sexual harassment by writer Jessica Teich, who said Dreyfuss showed her his penis. Dreyfuss denies exposing himself, but admitted that "at the height of my fame in the late 1970s I became an asshole — the kind of performative masculine man my father had modeled for me to be. I lived by the motto, 'If you don't flirt, you die.' And flirt I did ... But I am not an assaulter."

Charles Dutoit

The artistic director and principal conductor of London's Royal Philharmonic Orchestra has been accused by four people (/story/life/people/2017/12/21/famed-conductor-charles-dutoit-accused-sexual-misconduct/972882001/) of sexual misconduct. Dutoit has yet to respond to the claims.

Heath Evans

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Michael Fallon

British Defense Secretary Michael Fallon was accused of inappropriate advances on two women. The Conservative resigned. Sexual harassment and assault allegations have also emerged against a number of other U.K. political figures.

Blake Farenthold

The Texas state representative plans to withdraw from the Republican primary (/story/news/local/texas/state-bureau/2017/12/14/report-farenthold-withdraw-race/951287001/) on March 6 after details emerged he settled a sexual harassment lawsuit filed by a former aide with $84,000 in taxpayers' money.

Marshall Faulk

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Adam Fields

Film producer Adam Fields has been accused of offering a promotion to a woman at his former employer, Relativity Media, in exchange for sex. He has denied the allegations.

Hamilton Fish

The president and publisher of *The New Republic* magazine resigned on Nov. 3 following a report from *The New York Times* (https://www.nytimes.com/2017/11/03/business/media/hamilton-fish-new-republic-resignation.html) of an investigation into allegations of inappropriate conduct by female employees. In an email to New Republic owner Win McCormack, Fish expressed "deep dismay" at the claims. "Women have longstanding and profound concerns with respect to their treatment in the workplace," he wrote. "Many men have a lot to learn in this regard. I know I do, and I hope for and encourage that new direction."

Harold Ford Jr.

The former Tennessee congressman Harold Ford Jr. was fired by Morgan Stanley (/story/money/nation-now/2017/12/07/report-former-rep-harold-ford-jr-fired-alleged-misconduct/931897001/) after accusations of misconduct. Ford denied the allegations and said he would bring legal action against the woman and his former employer.

Al Franken

The Democratic U.S. Senator from Minnesota and *Saturday Night Live* alum was accused by TV host and broadcaster Leeann Tweeden (/story/news/politics/2017/11/16/sen-al-franken-accused-kissing-and-groping-sportscaster-leeann-tweeden-without-her-consent/870097001/) of kissing and groping her without her consent while on a USO tour in the Middle East in 2006. A second woman has stepped forward claiming Franken inappropriately touched her. While Congressional leaders seek a review of the claims, Franken apologized for the Tweeden incident (/story/news/politics/onpolitics/2017/11/16/read-al-frankens-apology-broadcaster-leeann-tweeden/87091300 1/). "I respect women," he said. "I don't respect men who don't. And the fact that my own actions have given people a good reason to doubt that makes me feel ashamed." Franken resigned on Dec. 7 (/story/news/politics/onpolitics/2017/12/07/sen-al-franken-takes-dig-trump-moore-resignation-speech/930997001/) after more than a half dozen women stepped forward with misconduct allegations.

Trent Franks

The Arizona representative said he would resign immediately (/story/news/politics/2017/12/08/rep-trent-franks-says-he-resign-immediately-citing-wifes-illnessa-day-after-announcing-he-would-step/935858001/), citing his wife's illness. Franks originally planned to step down in January after an aide claimed he repeatedly asked her to serve as a surrogate.

Alex Gilady

International Olympic Committee member Alex Gilady has been accused by two women of rape and by two others of inappropriate conduct (/story/sports/olympics/2017/11/09/olympic-ethics-panel-to-study-allegations-against-gilady/107494366/). Gilady denied the rape accusations, said he didn't recall one of the other allegations, but acknowledged a claim he'd propositioned a woman during a job interview 25 years ago was "mainly correct." He stepped down as president of an Israeli broadcasting company he founded. The IOC has said it is looking into the allegations.

Gary Goddard

The producer and writer (*Masters of the Universe*), was accused by *ER* actor Anthony Edwards of molesting him in an essay (https://medium.com/@anthonyedwards/yes-mom-there-is-something-wrong-f2bcf56434b9) published Nov. 10 on Medium. Edwards says he first met Goddard when he was 12, and served as a leader for Edwards' group of friends. "Everyone has the need to bond, and I was no exception," Edwards wrote. "My vulnerability was exploited. I was molested by Goddard, my best friend was raped by him — and this went on for years. The group of us, the gang, stayed quiet." Goddard's press representative Sam Singer put out a statement on Nov. 10 "unequivocally" denying Edward's charges. Since then, eight more former child actors have stepped forward (/story/life/people/2017/12/20/8-former-child-actors-accuse-producer-gary-goddard-sexual-misconduct/969095001/) to accuse Goddard of sexual harassment.

David Gomberg

Oregon state Rep. David Gomberg told The Oregonian/OregonLive (http://www.oregonlive.com/politics/index.ssf/2017/10/oregon_lawmaker_accused_of_ina.html) that two women's complaints against him involved "inappropriate humor or inappropriate touching," invasion of "personal space" and hugging. The Democratic representative has publicly apologized (https://www.thenewsguard.com/news/report-rep-gomberg-accused-of-inappropriate-behavior-responds/article_554063ee-bbfa-11e7-924b-1707c7ce98b7.html).

Brian Gosch

The former House Majority Leader in South Dakota was accused by former state lawmaker (/story/news/politics/2017/10/13/former-state-lawmaker-lobbyist-tell-sexual-harassment-rape-pierre/762566001/) and lobbyist Angie Buhl O'Donnell of asking for a hug and making comments about her breasts. Gosch said the comments were made in jest and not meant to make her feel uncomfortable.

Tyler Grasham

The Hollywood agent was fired from the Agency of the Performing Arts after a former actor accused him of sexual assault more than a decade ago while he was in his teens, reports *The Wrap* (https://www.thewrap.com/blaise-godbe-lipman-tyler-grasham-apa-hollywood-agent-fed-me-alcohol-sexually-assaulted-me/). Filmmaker Blaise Godbe Lipman claims Grasham gave him alcohol while underage and sexually assaulted. Actor Tyler Cornell also filed a police report against Grasham, alleging "a sodomy crime," according to *Variety* (http://variety.com/2017/biz/news/tyler-grasham-lapd-investigation-apa-agent-sexual-assault-sodomy-1202601993/). At least five men (http://losangeles.cbslocal.com/2017/10/31/agent-sexual-assault-tyler-grasham/) have accused him of sexual misconduct.

Jon Grissom

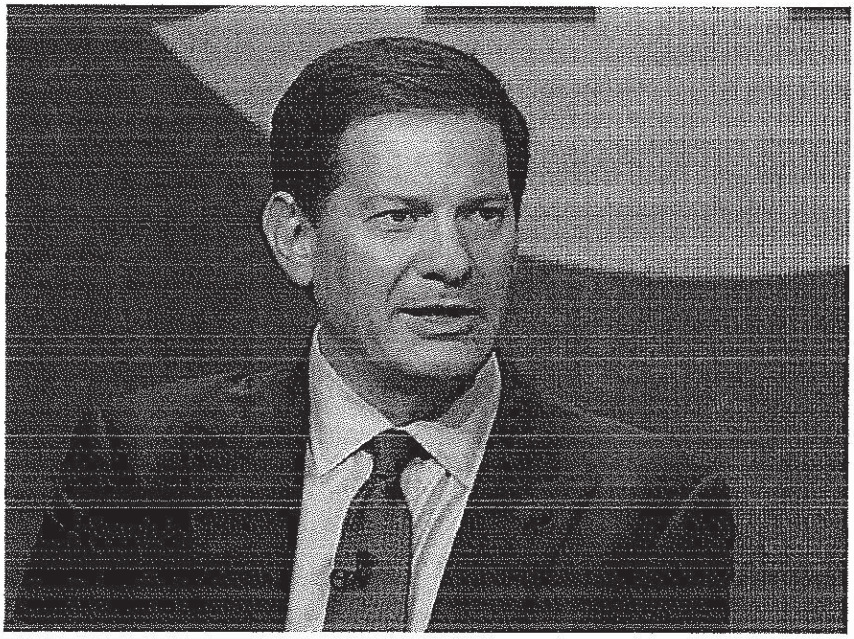
Former child star Corey Feldman identified former actor Jon Grissom (/story/life/people/2017/11/02/corey-feldman-identifies-man-he-says-molested-him/828210001/) as one of the men who molested him when he was a young teen in Hollywood. Feldman identified Grissom to *Dr. Oz* on Nov. 2, but not on air. Feldman called on victims to speak out and abusers to turn themselves in: "If you do not, we're coming for you."

David Guillod

The manager, producer and co-CEO of Primary Wave Entertainment (*Atomic Blonde*), was accused by actress Jessica Barth of drugging and sexually assaulting her in 2012 when he was working as her manager, she confirmed to *The Wrap* (https://www.thewrap.com/david-guillod-jessica-barth-ted-atomic-blonde-producer-drugged-assaulted-exclusive/) on Nov. 2. Barth said she reported the incident to the LAPD after it happened. She then said that Guillod threatened her with a lawsuit to keep her from pressing charges. Following the allegations, Guillod's attorney said charges were fully

igated at the time, but he has taken a leave of absence from the company, reports *Deadline* (http://deadline.com/2017/11/david-guillod-leave-of-absence-primary-wave-sexual-assault-accusation-jessica-barth-1202201162/) and *The Hollywood Reporter* (http://www.hollywoodreporter.com/news/primary-wave-ceo-david-guillod-takes-leave-absence-sexual-assault-claims-1054750).

Mark Halperin



NBC News ended its contract with political commentator Mark Halperin after he was accused of sexual harassment. *(Photo: Richard Shotwell, AP)*

The MSNBC political analyst was accused by five women of sexual harassment (http://money.cnn.com/2017/10/25/media/mark-halperin-sexual-harassment-allegations/index.html), including forcible kissing. One woman claims Halperin grabbed her breasts. NBC News terminated his contract (/story/money/nation-now/2017/10/30/nbc-terminates-mark-halperins-contract-over-sexual-harassment-allegations-reports-say/812885001/), and he lost both a book deal and HBO project (https://preview.usatoday.com/story/money/nation-now/2017/10/26/5-accuse-nbc-analyst-mark-halperin-sexual-harassment/801982001/). In a statement to CNN, Halperin said he would take a step back to deal with the situation. "I now understand from these accounts that my behavior was inappropriate and caused others pain," he said. "For that, I am deeply sorry and I apologize."

Andy Henry

Casting employee Andy Henry admitted to urging women to take off their clothes during coaching sessions in 2008 while working on the "CSI" series. He was fired by his current employer.

Cliff Hite

The former Ohio senator resigned over claims (/story/news/politics/2017/10/28/yformer-ohio-senator-cliff-hite-repeatedly-sought-sex-legislative-employee-despite-refusals-memo-say/809267001/) he repeatedly asked a female legislative employee for sex. According to a memo obtained from the woman's employer, she refused his advances eight or nine times. "I sometimes asked her for hugs and talked with her in a way that was not appropriate for a married man, father and grandfather like myself," said Hite in a statement.

Dustin Hoffman

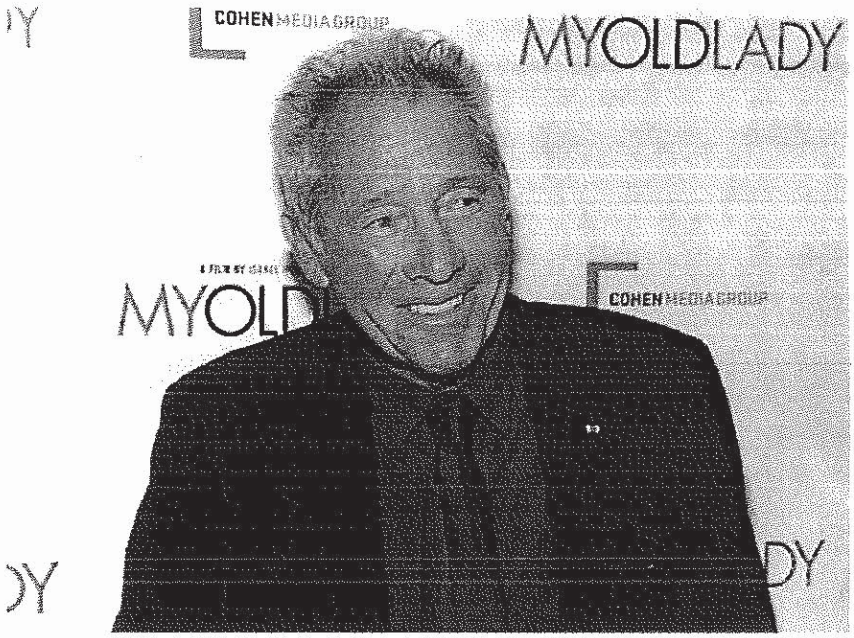
Anna Graham Hunter alleges that Oscar-winning actor Dustin Hoffman groped her and talked about sex in front of her while she was a 17-year-old intern on the set of his 1985 TV-movie adaptation of 'Death of a Salesman.' Hoffman apologized in a statement to the 'Associated Press,' saying, "I have the utmost respect for women and feel terrible that anything I might have done could have put her in an uncomfortable situation... It is not reflective of who I am." The following day, a second accuser, Wendy Riss Gatsiounis told 'Variety' the actor made verbal advances and tried to convince her to go to a hotel. *(Photo: Jordan Strauss, Invision/AP)*

The Oscar-winning actor known for *Rain Man* and *The Graduate*, was accused of sexual harassment by Anna Graham Hunter in an article published by *The Hollywood Reporter* (http://www.hollywoodreporter.com/features/dustin-hoffman-sexually-harassed-me-i-was-17-guest-column-1053466) on Nov. 1. Hunter alleges talked about sex in front of her while she was a 17-year-old intern on the set of his 1985 TV-movie adaptation of *Death of a Salesman*. Hoffman apologized in a statement to the Associated Press (/story/life/people/2017/11/01/dustin-hoffman-apologizes-alleged-1985-sexual-harassment-incident/821209001/), saying, "I have the utmost respect for women and feel terrible that anything I might have done could have put her in an uncomfortable situation... It is not reflective of who I am." The following day, a second accuser (/story/life/people/2017/11/02/dustin-hoffman-second-woman-accuses-oscar-winner-sexual-harassment/825099001/), Wendy Riss Gatsiounis, told *Variety* he made verbal advances and tried to convince her to go to a nearby hotel when she was a playwright in her 20s.

Jeff Hoover

Kentucky House Speaker Jeff Hoover stepped down as speaker after news surfaced that the Republican had settled a sexual harassment claim from a GOP caucus staffer. Hoover denied the harassment allegation but said he sent consensual yet inappropriate text messages. He remains in the Legislature.

Israel Horovitz



Nine women have accused playwright Israel Horovitz of sexual misconduct and his son, Beastie Boys' Adam Horovitz, says he believes the accusers. *(Photo: Andy Kropa, Andy Kropa /Invision/AP)*

Nine women who have accused award-winning playwright Israel Horowitz of sexual misconduct have the support of his son, Adam Horovitz of the Beastie Boys (/story/life/people/2017/11/30/beastie-boys-adam-horovitz-father-sexual-abuse-allegations/912229001/). The women detailed their allegations against Horovitz in a story Nov. 30 in The New York Times. Some were in the teens and others were in their 20s when they say the incidents occurred. The alleged abuse by Horovitz includes forced kissing, sexual touching and rape.

Dylan Howard

Dylan Howard, the top editor for the *National Enquirer* (/story/money/business/2017/12/05/ap-exclusive-top-gossip-editor-accused-sexual-misconduct/924783001/), *Us Weekly* and other major gossip publications openly described his sexual partners in the newsroom, discussed female employees' sex lives and forced women to watch or listen to pornographic material, former employees told The Associated Press.

Jesse Jackson

The civil rights activist was accused by The Root writer Danielle Young (https://www.theroot.com/don-t-let-the-smile-fool-you-i-m-cringing-on-the-insid-1819987586) of inappropriate touching following a keynote speech he gave. She said colleagues witnessed him grab her thigh. In a statement given to The Root, a representative for Jackson said he does not recall the incident but "profoundly and sincerely regrets any pain Ms. Young may have experienced."

Fullscreen

The Rev. Jesse Jackson through the years

Danny Jordaan

Former South African soccer association president Danny Jordaan (/story/news/world/2017/11/14/weinstein-effect-goes-global-powerful-men-confronted/862353001/) has been accused by former member of parliament Jennifer Ferguson of raping her in 1993. Jordaan denies the accus on.

Ethan Kath

The songwriter and producer of Canadian music group Crystal Castles was accused of rape on Oct. 24 by former bandmate Alice Glass in a lengthy letter posted on her website, *Vulture* (http://www.vulture.com/2017/10/alice-glass-accuses-crystal-castless-ethan-kath-of-rape.html) and *The Huffington Post* (https://www.huffingtonpost.com/entry/alice-glass-crystal-castles-abuse_us_59f090f0e4b0e064db7e0d20) report. She claims the abuse lasted for almost 10 years, starting when she was 15 years old, and that this was the reason she left the band, which she co-founded with Kath, in 2014. In a statement to Pitchfork (https://pitchfork.com/news/alice-glass-accuses-crystal-castles-co-founder-ethan-kath-of-rape-and-assault/) via his attorney, Kath — whose real name is Claudio Palmieri — denied the allegations. "I am outraged and hurt by the recent statements made by Alice about me and our prior relationship," the statement reads. "Fortunately, there are many witnesses who can and will confirm that I was never abusive to Alice."

Garrison Keillor

Ethan Kath (Claudio Palmieri), 34, a songwriter and producer of Canadian music group Crystal Castles. *(Photo: C Flanigan, FilmMagic)*

The veteran radio host confirmed he was fired by Minnesota Public Radio (/story/life/people/2017/11/29/garrison-keillor-fired-alleged-improper-behavior-minnesota-public-radio/905491001/) for accusations of improper behavior. In a follow-up statement, Keillor told The Associated Press he was dismissed over "a story that I think is more interesting and more complicated than the version MPR heard." MPR said it is ending its business relationship with Keillor, which includes rebroadcasts of *The Best of A Prairie Home Companion*.

Ruben Kihuen

Rep. Ruben Kihuen, D-Nev., speaks with reporters on Capitol Hill in Washington on Nov. 14, 2016. *(Photo: Cliff Owen, AP)*

U.S. Rep. Ruben Kihuen, D-Nev., is alleged to have touched the thighs of a campaign aide as well as asked her out on dates and commented on her appearance, according to a Dec. 1 report by Buzzfeed News (https://www.buzzfeed.com/katenocera/she-says-she-quit-her-campaign-job-after-he-harassed-her?utm_term=.fxOxmVkZw#.gr89bK2EY). Democratic Congressional Campaign Committee chairman Rep. Ben Ray Lujan called on Kihuen to resign. Kihuen's office released a statement, including: "I sincerely apologize for anything that I may have said or done that made her feel uncomfortable."

Robert Knepper

Actor Robert Knepper, star of *Prison Break* and *iZombie*, has been accused by one woman of sexual assault. He denies the allegations.

Andrew Kreisberg

The creator of CW superhero series *Arrow*, *The Flash*, *Supergirl* and *Legends of Tomorrow*, was fired by Warner Bros (/story/life/tv/2017/11/29/supergirl-producer-andrew-kreisberg-fired-after-sexual-misconduct-investigation/905716001/)., spokesperson Tammy Golihew confirmed to USA TODAY, after *Variety (http://variety.com/2017/tv/news/warner-bros-sexual-harassment-andrew-kreisberg-1202612522/)*published a story in which 15 women and four men alleged sexual harassment and inappropriate physical contact. He told the trade magazine that he denied any inappropriate touching or massages, saying "I have made comments on women's appearances and clothes in my capacity as an executive producer, but they were not sexualized. Like many people, I have given someone a non-sexual hug or kiss on the cheek."

Jeff Kruse

Two Oregon lawmakers filed formal complaints (http://www.oregonlive.com/politics/index.ssf/2017/11/second_oregon_state_senator_pu.html) against the Republican state Sen. Jeff Kruse for sexual harassment and inappropriate touching. Kruse denied the allegations in an interview with *The Oregonian* (http://www.oregonlive.com/politics/index.ssf/2017/11/second_oregon_state_senator_pu.html).

Knight Landesman

publisher of Artforum has been accused by multiple women of sexual harassment. According to *The New York Times* (https://www.nytimes.com/2017/10/25/nyregion/knight-landesman-artforum-sexual-harassment-lawsuit.html), nine women filed a lawsuit in New York claiming he sexually harassed them. Landesman has resigned from the magazine.

John Lasseter

The chief creative officer of Pixar and Walt Disney Animation Studios, will take a six-month leave of absence (/story/life/movies/2017/11/21/disney-pixar-head-john-lasseter-takes-leave-absence-after-missteps/886425001/) following what he called "missteps" in a memo obtained by USA TODAY on Nov. 21. The news broke as *The Hollywood Reporter* was compiling a report into alleged sexual misconduct, which published later that day citing sources who remain unnamed "out of fear that their careers in the tight-knit animation community would be damaged." The insiders told the industry publication that his behavior went beyond hugging to "grabbing, kissing, making comments about physical attributes."

Jack Latvala

Florida Republican state Sen. Jack Latvala is being investigated by the Senate over allegations of harassment and groping. Latvala has denied the allegations.

Matt Lauer

NBC News announced it fired the Today show co-host (/story/life/2017/11/29/matt-lauer-fired-nbc-inappropriate-workplace-behavior/904340001/) for "inappropriate workplace behavior." According to a memo from NBC News chairman Andrew Lack, Lauer's dismissal was sparked by "a detailed complaint from a colleague about inappropriate sexual behavior" in the workplace. The memo also said while this is the first formal complaint against Lauer during his NBC tenure, "we were also presented with reason to believe this may not have been an isolated incident."

Steve Lebsock

The Colorado state representative has been accused of harassment (/story/news/local/colorado/2017/11/11/accused-harassment-colorado-rep-lebsock-apologizes-causing-pain/855762001/) including inappropriate comments. Lebsock later apologized (https://www.stevelebsockforcolorado.com/press-release-1/#pressreleases) for "the pain I have caused."

James Levine

New York's Metropolitan Opera suspended its relationship with longtime conductor James Levine (/story/life/people/2017/12/03/metropolitan-opera-suspects-conductor-james-lesexual-abuse-accusations-against-conductor-james-levin/917728001/%20%C2%A0) Dec. 3 pending an investigation into multiple allegations of sexual misconduct against him. Several of the men accusing him say they were underage (/story/life/music/2017/12/05/metropolitan-opera-waited-year-to-act-on-accusation-against-conductor-james-levine/108325956/) when the incidents took place.

Corey Lewandowski

President Trump's former campaign manager was accused of sexual assault after a singer and potential congressional candidate claimed he hit her twice on her buttocks during a Washington gathering in November. According to the Associated Press (/story/news/politics/2017/12/27/singer-says-she-filed-sex-assault-complaint-against-former-trump-aide-corey-lewandowski/983672001/), Lewandowski did not respond to an email seeking comment.

Ivan Lewis

U.K. Labour Party member Ivan Lewis has been suspended over an allegation of sexual misconduct; Lewis disputed the account but apologized if his behavior had been "unwelcome or inappropriate."

Ryan Lizza

The reporter was fired from *The New Yorker* on Dec. 11 (/story/money/business/2017/12/11/new-yorker-fires-reporter-ryan-lizza-over-alleged-sexual-misconduct/942412001/) for an incident of "improper sexual conduct." CNN later suspended him as an on-air contributor. "I am dismayed that *The New Yorker* has decided to characterize a respectful relationship with a woman I dated as somehow inappropriate," said Lizza in a statement.

Peter Martins

Peter Martins (/story/life/people/2017/12/05/new-york-city-ballet-peter-martins-under-investigation-sexual-harassment/108326006/), who has led New York City Ballet since the 1980s, has been removed from teaching his weekly class at the School of American Ballet while the two organizations jointly investigate an accusation of sexual harassment against him, it was announced Dec. 4. On January 1, Martins announced he would retire, reports *The New York Times* (https://www.nytimes.com/2018/01/01/arts/dance/peter-martins-resigns-ballet.html?smid=tw-nytimes&smtyp=cur).

Danny Masterson

Actor Danny Masterson has been ousted from the Netflix series 'The Ranch' amid multiple sexual assault allegations. Revisit Masterson's Hollywood career in photos, from 'That '70s Show' to his more current projects. *(Photo: Annie I. Bang, Annie I. Bang/Invision/AP)*

Netflix yanked the actor from the series *The Ranch*following a series of sexual assault allegations (/story/life/people/2017/12/05/danny-masterson-fired-netflixs-amid-allegations/922500001/). In March, Los Angeles police said they started investigating Masterson after three women reported being sexually assaulted by him in the early 2000s. Masterson denies the allegations. "Law enforcement investigated these claims more than 15 years ago and determined them to be without merit," he said in the statement. "I have never been charged with a crime, let alone convicted of one."

Donovan McNabb

The former NFL quarterback was suspended by ESPN (/story/sports/nfl/2017/12/12/donovan-mcnabb-eric-davis-suspended-espn-investigates-sexual-harassment-allegations-nfl-network/943898001/) after he was named in a sexual misconduct lawsuit over claims while he was employed by NFL Network. McNabb has yet to comment on the claims.

Benny Medina

The manager who currently represents Jennifer Lopez was accused of attempted rape by *Sordid Lives* star Jason Dottley in an interview published by *The Advocate* (https://www.advocate.com/crime/2017/11/10/sordid-lives-actor-alleges-mogul-benny-medina-tried-rape-him) on Nov. 10. After throwing Dottley onto a bed in Medina's Los Angeles mansion in 2008, Medina "stuck his tongue down my mouth," Dottley alleges in the interview. A statement from Medina's lawyers Howard Weitzman and Shawn Holley to USA TODAY said Medina "categorically denies the allegation of attempted rape."

Tony Mendoza

Three women have accused California state Sen. Tony Mendoza of sexual harassment, the *Los Angeles Times* (http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-senate-panel-on-sen-tony-mendoza-from-1511802516-htmlstory.html) and *Sacramento Bee* (http://www.sacbee.com/news/politics-government/capitol-alert/article185133028.html) report. The Democrat was booted from leadership positions pending an investigation. He has denied wrongdoing.

Murray Miller

A screenwriter best known for the hit TV series *Girls* was accused of sexual assault by actress Aurora Perrineau, according to a. Nov. 20 report from *The Wrap* (https://www.thewrap.com/girls-murray-miller-aurora-perrineau-harold-perrineau-lost-oz/). Perrineau, who alleges the incident occurred in 2012 when she was 17, filed a report at the West Hollywood station of the Los Angeles County Sheriff's Department, Sgt. Nelson Rios confirmed to USA TODAY. Miller's attorney, Matthew B. Walerstein, sent USA TODAY a statement (/story/life/tv/2017/11/18/report-actress-aurora-perrineau-accuses-girls-writer-murray-miller-sexual-assault/876665001/) in which his client denied Perrineau's allegations. *Girls* creator and star Lena Dunham and executive producer Jenni Konner issued a statement Friday in support of Miller, which she later apologized for (/story/life/people/2017/11/19/lena-dunham-sorry-timing-statement-backing-girls-writer-accused-sexual-assault/878606001/) after receiving criticism. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

T.J. Miller

The actor denied claims reported in The Daily Beast (/story/life/people/2017/12/19/actor-t-j-miller-denies-accusations-sexual-assault-physical-violence/964492001/) from an anonymous alleged victim who said he punched and sexually assaulted her.

Roy Moore

The Republican candidate for U.S. Senator in Alabama was accused by eight women of a range of inappropriate conduct, ranging from unwanted attention to sexual misconduct and assault. Most of the incidents took place when Moore was assistant district attorney in Gadsden from 1977 to 1982. One woman, Leigh Corfman, said she was 14 when Moore, then 32, took her to his home, undressed her and guided her hand over his crotch. The legal age of consent, then and now, is 16. Moore calls the allegations "completely false," (/story/news/nation-now/2017/11/15/roy-moore-attorney-demands-accusers-yearbook/868848001/) and plans to continue his Senate campaign.

Rick Najera

The writer and producer was fired by CBS from his role as director of the network's annual diversity showcase after claims surfaced he made inappropriate comments to performers, reports *Variety* (http://variety.com/2017/tv/news/cbs-diversity-showcase-1202601412/). In a statement to *Variety*, Najera said he was "shocked" by the allegations. "Anyone who has been slammed by libelous deceptions knows exactly how we feel."

Larry Nassar

Longtime USA Gymnastics doctor Larry Nassar has been accused of sexual abuse by more than 120 women (/story/sports/olympics/2017/11/21/larry-nassar-usa-gymnastics-expected-plead-guilty-sexual-assault/886906001/) since the *Indianapolis Star* (/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/) first reported on assault allegations in September 2016. Since the #metoo movement, three members of the Fierce Five – the U.S. women's gymnastics team that won all-around gold at the 2012 London Olympics – have said he abused them, too: McKayla Maroney (/story/sports/olympics/2017/10/18/olympic-gold-medalist-mckayla-maroney-says-she-victim-sexual-abuse/774970001/), Aly Raisman (/story/sports/olympics/2017/11/12/aly-raisman-60-minutes-interview-larry-nassar/857203001/) and Gabby Douglas (/story/sports/olympics/2017/11/21/gabby-douglas-says-she-was-abused-former-usa-gymnastics-doctor-larry-nassar/886447001/). On Dec. 7, Nassar was sentenced to 60 years (/story/news/local/2017/12/07/larry-nassar-sentenced-60-years-federal-child-pornography-case/908838001/) in federal prison for child pornography.

Nelly

The rapper has been sued by a woman (/story/life/music/2017/12/21/woman-sues-rapper-nelly-claiming-sexual-assault-defamation/972283001/) claiming he sexually assaulted her on his tour bus and later damaged her reputation by refuting her account. Nelly's attorney says the lawsuit is financially motivated and a countersuit is planned.

Michael Oreskes

Mike Oreskes resigned as NPR's senior vice president for news after two women accused him of kissing them while discussing job prospects when he worked for the New York Times in Washington, D.C. *(Photo: Chuck Zoeller, AP)*

The senior vice president for news at National Public Radio resigned on Nov. 1 (http://www.npr.org/sections/thetwo-way/2017/11/01/561363158/nprs-head-of-news-resigns-following-harassment-allegations) after multiple women accused him of inappropriate conduct. Two women claimed (/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001/) Oreskes abruptly kissed them on the lips and stuck his tongue in their mouths while discussing job prospects, according to *The Washington Post*. The incidents took place while he was *The New York Times'* Washington D.C. bureau chief in the 1990s. A third woman filed a complaint at NPR accusing him of harassment in October 2015. "I am deeply sorry to the people I hurt," Oreskes said in a statement. "My behavior was wrong and inexcusable, and I accept full responsibility."

Shervin Pishevar

Less than a week after being hit with claims that he sexually harassed six women, Virgin Hyperloop One co-founder Shervin Pishevar (/story/tech/2017/12/05/hyperloop-cofounder-pishevar-takes-leaves-after-harassment-allegations/923730001/) said Dec. 5 he was taking a leave of absence from his businesses to focus on a lawsuit against a research firm that he believes is behind a smear campaign. A Bloomberg report charged that the venture capitalist and early Uber investor groped Uber employee Austin Geidt at a 2014 Uber party, citing unnamed witnesses.

Jeremy Piven

The actor on the TV series *Entourage*, was accused by actress and reality star Ariane Bellamar of groping her on two occasions. In her tweets (https://twitter.com/ArianeBellamar/status/925104391748837377) published Oct. 30, she alleges one encounter took place in Piven's trailer on the *Entourage* set, when he allegedly grabbed her breasts and bottom, and the other occurred at the Playboy Mansion. Piven denied the allegations in a statement sent to USA TODAY (/story/life/2017/10/31/cbs-investigating-harassment-allegations-against-jeremy-piven/819607001/) by his rep, Jennifer Allen: "I unequivocally deny the appalling allegations being peddled about me." CBS, which airs Piven's new series, *Wisdom of the Crowd*, said in a statement, "We are aware of the media reports and are looking into the matter." (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Roy Price

In August, producer Isa Hackett accused Amazon Studios chief Roy Price of making unwanted sexual remarks. It wasn't until after the Weinstein scandal broke that Price was forced out of his high-profile job. *(Photo: Barry Brecheisen, AP)*

The Amazon Studios programming chief resigned in October after Isa Hackett, a producer of Amazon Studios' series *The Man in the High Castle*, accused him of insistently and repeatedly propositioning her (/story/tech/2017/10/17/amazon-studios-head-roy-price-steps-down-amid-harassment-claims/773801001/) in 2015. Two of Price's lieutenants, Joe Lewis and Conrad Riggs, were also let go shortly after his departure. Price has yet to issue a statement on the allegation.

Brett Ratner

The producer and director (*Rush Hour*, *X-Men: The Last Stand*), was accused of sexually harassing six women, including actresses Olivia Munn and Natasha Henstridge, in a Nov. 1 report from the *Los Angeles Times* (http://www.latimes.com/business/hollywood/la-fi-ct-brett-ratner-allegations-20171101-htmlstory.html). In an Facebook post, Melanie Kohler claimed Ratner "was a rapist at least one night in Hollywood about 12 years ago" and that he "preyed on me as a drunk girl (and) forced himself on me." Ratner is suing Kohler for libel, and is no longer working on projects at Warner Bros.

Twiggy Ramirez

The former bassist and guitarist of the band Marilyn Manson was accused of rape Oct. 20 by Jack Off Jill singer Jessicka Addams, who shared in a Facebook post (https://www.facebook.com/MissJessickaAddams/posts/10155413298828005) that White — whose real name is Jeordie White — physically and sexually assaulted her while they were dating. On Oct. 24, Marilyn Manson shared in a Twitter statement that he decided to "part ways with Jeordie White as a member of Marilyn Manson." (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Jerry Richardson

The owner of the NFL's Carolina Panthers faces an NFL investigation into alleged sexual misconduct (/story/sports/nfl/2017/12/17/nfl-taking-over-investigation-of-richardson-allegations/108698472/) following a Sports Illustrated report claiming he made sexually suggestive comments to women. Although he did not address allegations, Richardson said hours after the report surfaced he planned to sell the team.

Terry Richardson

The fashion photographer faces multiple allegations since 2010 (/story/life/2017/10/24/sexually-explicit-fashion-photographer-terry-richardson-banned-british-vogue/795390001/), when some models began going public, describing episodes of graphic abuse, inappropriate touching and sexual harassment during photo shoots. Condé Nast International discontinued working with Richardson Oct. 24 and banned him from future assignments. "He is an artist who has been known for his sexually explicit work so many of his professional interactions with subjects were sexual and explicit in nature but all of the subjects of his work participated consensually," said a representative for Richardson in a statement to BuzzFeed (https://www.buzzfeed.com/markdistefano/conde-nast-terry-richardson?utm_term=.gpXNMwy88#.gj7ZBegzz). (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Rich Rodriguez

The University of Arizona fired the football coach on Jan. 2 (/story/sports/ncaaf/pac12/2018/01/02/arizona-fires-football-coach-rich-rodriguez/998676001/) amidst an investigation into an off-the-field allegation of sexual harassment. The university said in a letter although the claims from a former athletic department employee could not be substantiated, they became aware of information causing concerns over the direction of the football program.

Charlie Rose

The longtime TV journalist was accused by eight women of sexual harassment (/story/life/tv/2017/11/21/cbs-morning-addresses-charlie-rose-scandal-charlie-does-not-get-pass-here/884102001/) in a report from *The Washington Post*. The women claim Rose made unwanted sexual advances toward them, including lewd phone calls and walking around naked in their presence. In a separate report, three CBS employees accused Rose of harassment during his tenure. CBS fired Rose, while PBS revealed it would no longer carry his long-running interview show.

Paul Rosenthal

The Colorado state representative was accused of inappropriately touching (/story/news/local/colorado/2017/11/15/second-colorado-lawmaker-accused-sexual-harassment/869220001/) a political organizer during a fundraiser in 2012. Rosenthal denies the claim.

Gilbert Rozon

Comedy festival organizer Gilbert Rozon has been accused by at least nine women of sexually harassing or sexually assaulting them. Rozon stepped down as president of Montreal's renowned "Just for Laughs" festival and apologized "to all those I have offended during my life."

Geoffrey Rush

The Sydney Theatre Company announced that an actress accused Geoffrey Rush (/story/life/people/2017/12/01/geoffrey-rush-denies-inappropriate-behavior-theater/912469001/), the Oscar-winning actor and a star of the Pirates of the Caribbean franchise, of inappropriate touching. Rush denies it, but announced Dec. 2 that he stepped down as president of the Australian Academy of Cinema and Television Arts amid the "current climate of innuendo and unjustifiable reporting."

Carl Sargeant

British Labour Party legislator Carl Sargeant is believed to have taken his own life after harassment allegations cost him his post as the Welsh government's Cabinet secretary for communities and children. He had asked for an independent inquiry to clear his name.

Chris Savino

An animator and writer best known for creating *The Loud House* was fired from Nickelodeon after multiple women lodged complaints against him, the network confirmed in a statement to *The Hollywood Reporter* (http://www.hollywoodreporter.com/live-feed/nickelodeon-fires-loud-house-creator-sexual-harassment-allegations-1050485). On Oct. 23, Savino posted an apology to his Facebook page, writing he is "deeply sorry" that his words and actions "created an uncomfortable environment," CBS News (https://www.cbsnews.com/news/chris-savino-ex-nickelodeon-producer-sexual-harassment-allegations/) and *The Hollywood Reporter* (http://www.hollywoodreporter.com/live-feed/fired-nickelodeon-showrunner-apologizes-sexual-harassment-allegations-surface-1051107) report. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Dan Schoen

Minnesota state legislator Dan Schoen announced his resignation in November after being accused of sexual misconduct. The Democratic first-term senator was accused of making unwanted advances against several women and sexually assaulting one of them. Schoen, 42, was accused by a Democratic candidate for office of grabbing her buttocks in 2015. Another candidate who is now a fellow Democratic lawmaker said he sent her a string of suggestive texts, and a Senate employee said he texted her a picture of male genitalia.

Mark Schwahn

A screenwriter best known for creating the popular TV series *One Tree Hill*, was accused of "traumatizing" sexual harassment by 18 cast and crew members of the show, including Sophia Bush and Hilarie Burton, in a letter published in *Variety* on Nov. 13 (http://variety.com/2017/tv/news/one-tree-hill-3-1202614198/). The letter was penned in support of former *Tree Hill* writer Audrey Wauchope, who detailed in a series of tweets (https://twitter.com/audreyalison/status/929504940254359552?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.usatoday.com%2Fstory%2Flife%2Fpeople%2F2017%2F11%2F14%2Fone-tree-hill-cast-unite-accuse-creator-mark-schwahn-sexual-harassment%2F861180001%2F) the treatment female crew endured on the show. On Dec. 21, Schwahn was fired by Lionsgate (/story/life/tv/2017/12/21/royals-creator-mark-schwahn-fired-after-sexual-misconduct-probe/975015001/).

Robert Scoble

The tech consultant and blogger was accused of sexual harassment by two women (/story/tech/2017/10/22/robert-scoble-resigns-transformation-group-after-sexual-harassment-allegations/789071001/). A third woman claimed Scoble verbally harassed her. On Oct. 22, Scoble's friend and partner said Scoble had agreed to step down from their business consulting firm Transformation Group. After initially apologizing for doing things "that are really, really hurtful to women," he said he's not guilty of sexual harassment (https://scobleizer.blog/) because he had no power to "make or break" the careers of women who made allegations against him. "Sexual Harassment requires that I have such power," he wrote.

Steven Seagal

The actor and producer (*Under Siege, Above the Law*), was accused of sexual harassment by Portia de Rossi (/story/life/people/2017/11/08/portia-de-rossi-claims-steven-seagal-unzipped-his-leather-pants-during-office-audition/846985001/), who claims he unzipped his pants during a private office audition. *ER* actress Julianna Margulies also revealed an incident she had with Seagal in an interview with *SiriusXM*'s Jenny Hutt (/story/life/2017/11/03/harvey-weinstein-news-criminal-investigations-updates-sexual-assault-harassment/828432001/) on Nov. 4. She claims the producer requested to go over a scene with her in his hotel room when she was 23, and once she arrived, the female assistant who said she would be there with her was gone.

Don Shooter

Eight women have accused Arizona state representative Don Shooter (/story/news/politics/legislature/2017/11/13/another-woman-accuses-arizona-rep-don-shooter-sexual-misconduct/860893001/) of misconduct, including inappropriate touching and comments. The Arizona House of Representatives has launched multiple investigations into the claims. Shooter has declined comment.

Andy Signore

The creator of entertainment site Screen Junkies and the YouTube series Honest Trailers was fired following several accusations from women on social media. One woman claimed (http://variety.com/2017/digital/news/honest-trailers-creator-andy-signore-fired-for-egregious-and-intolerable-sexual-behavior-1202583996/) Signore tried to sexually assault her and threatened to fire her boyfriend if she went public. In a statement posted to Twitter (https://twitter.com/defymedia/status/917199853658169345) on October 8, employer Defy Media called his behavior "egregious" and "intolerable." The *New York Times* (https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html), *Variety* (http://variety.com/2017/digital/news/honest-trailers-creator-andy-signore-fired-for-egregious-and-intolerable-sexual-behavior-1202583996/)and IndieWire (http://www.indiewire.com/2017/10/andy-signore-suspended-screen-junkies-honest-trailers-1201884692/)reported on the fallout.

Gene Simmons

The member of rock group Kiss was named in a lawsuit filed in Los Angeles Superior Court, according to the San Bernardino Sun (http://www.sbsun.com/2017/12/15/kiss-bassist-gene-simmons-facing-lawsuit-alleging-sexual-battery-during-socal-interview/). Simmons is accused of making unwarranted sexual advances at an on-air radio personality during an interview at a restaurant he co-owns with bandmate Paul Stanley. Simmons denies the accusations (/story/life/people/2017/12/17/kiss-frontman-gene-simmons-denies-accusations-sexual-misconduct/959583001/).

Bryan Singer

A lawsuit filed in Washington state claims (/story/life/movies/2017/12/07/new-lawsuit-alleges-director-bryan-singer-raped-17-year-old-boy/933265001/) the director behind the *X-Men* films sexually assaulted a 17-year-old boy. In a statement to Variety, Singer denies the allegations. The lawsuit landed the same week Singer was fire from directing the Queen biopic *Bohemian Rhapsody*.

Ira Silverstein

Illinois state Sen. Ira Silverstein has been accused by activist Denise Rotheimer of "mind games" and commenting on her appearance, according to the *Chicago Sun-Times (https://chicago.suntimes.com/news/leadership-post-stripped-for-senator-named-at-harassment-hearing/)*. She said he did not proposition her or initiate physical contact, the *Chicago Tribune (http://www.chicagotribune.com/news/opinion/zorn/ct-perspec-zorn-silverstein-rotheim-papers-1108-20171107-story.html)* reports.

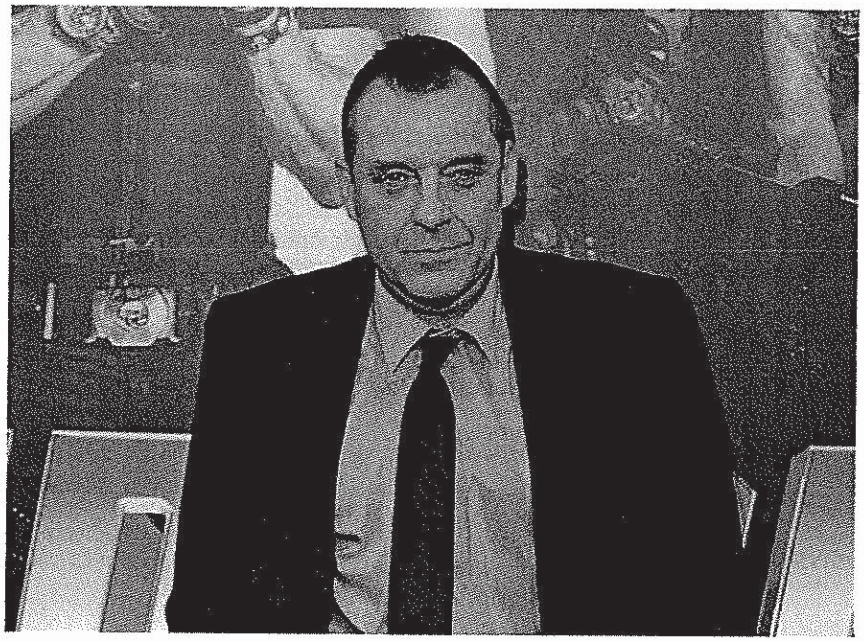
Russell Simmons

The music mogul was accused of assault by model Keri Claussen Khalighi when she was 17, according to a report in *The Los Angeles Times* (http://www.latimes.com/business/hollywood/la-fi-brett-ratner-russell-simmons-20171119-htmlstory.html). Khalighi claims Simmons assaulted her and coerced her to perform oral sex while director Brett Ratner — then a music video producer — was present. In a statement (/story/life/people/2017/11/19/russell-simmons-accusations-terry-crews-brett-ratner/878856001/), Simmons said he "completely and unequivocally" denies the claims.

John Singleton

Director John Singleton was accused by The Root author Danielle Young (https://www.theroot.com/don-t-let-the-smile-fool-you-i-m-cringing-on-the-insid-1819987586) of making sexual advances while interviewing him about his new show *Snowfall*. She says others witnessed it. Singleton has yet to comment on the incident.

Tom Sizemore



An 11-year-old actress on the set of crime thriller Born Killers (shot as Piggy Banks) in 2003, according to a report from The Hollywood Reporter published Nov. 13, alleges that Tom Sizemore touched her genitals during a photo shoot for the film. His agent Stephen Rice, told the industry trade paper, "Our position is 'no comment.'" *(Photo: Jordan Strauss, Invision/AP)*

The actor known for *Saving Private Ryan,* was accused of molesting an 11-year-old actress on the set of crime thriller *Born Killers* (shot as *Piggy Banks*) in 2003, according to a report from (http://www.hollywoodreporter.com/news/tom-sizemore-was-removed-movie-set-allegedly-violating-11-year-old-girl-1057629)*The Hollywood Reporter (http://www.hollywoodreporter.com/news/tom-sizemore-was-removed-movie-set-allegedly-violating-11-year-old-girl-1057629)*published Nov. 13. The child actress allegedly told her mother that Sizemore touched her genitals during a photo shoot for the film. According to *THR*, her parents declined to press charges and months later, Sizemore returned for reshoots in Malibu. His agent, Stephen Rice, told the industry trade paper, "Our position is 'no comment.'"

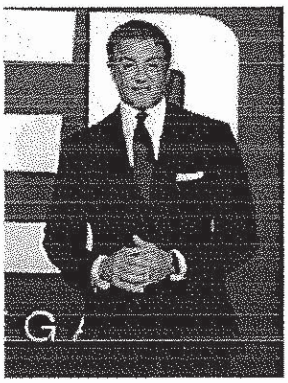
Tavis Smiley

PBS definitely suspended the late-night TV show host (/story/life/2017/12/13/tavis-smileys-show-dropped-pbs-amid-troubling-allegations-misconduct/950476001/) following "multiple, credible allegations" of misconduct. According to *Variety* (http://variety.com/2017/tv/news/tavis-smiley-pbs-1202639424/), an investigation found credible allegations Smiley had engaged in sexual relationships with multiple subordinates, and that some believed their jobs depended on a sexual relationship with Smiley. Smiley denies any wrongdoing.

Kevin Spacey

The actor best known for his role on *House of Cards* and *American Beauty*, has been accused of sexual harassment by several people including actor Anthony Rapp (/story/life/people/2017/10/30/who-anthony-rapp-actor-who-accused-kevin-spacey-sexual-harassment/812414001/), who claims he was 14 when Spacey made advances towards him in 1986. Spacey apologized to Rapp via Twitter on Oct. 30, writing, "I owe him the sincerest apology for what would have been deeply inappropriate drunken behavior, and I am sorry for the feelings he describes having carried with him all these years." The actor also came out as gay in the statement. Spacey plans to "seek evaluation and treatment," the actor's representative Staci Wolfe told USA TODAY (/story/life/people/2017/11/01/kevin-spacey-scandal-new-accuser-says-actor-made-advances-him-teen/820324001/). (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Sylvester Stallone



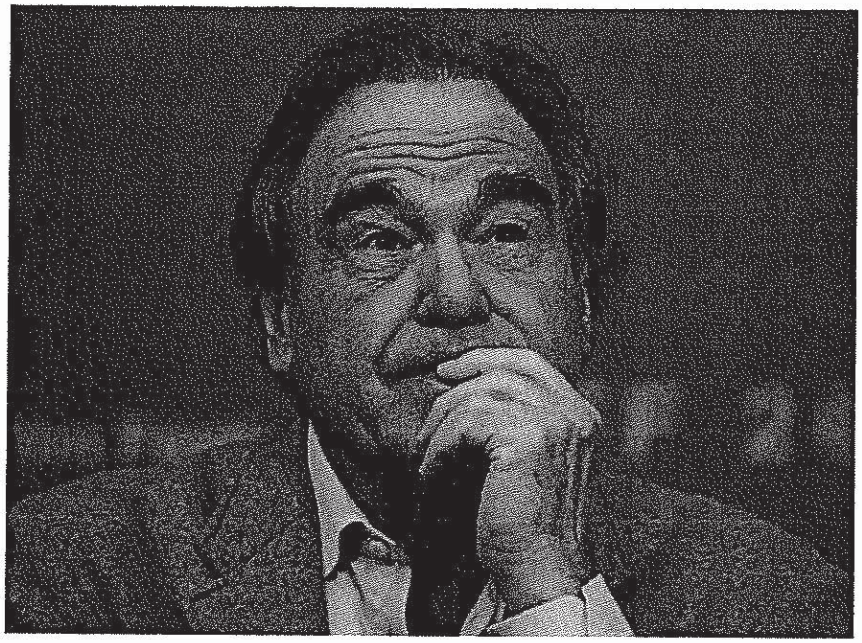
A rep for Sylvester Stallone has called decades-old sexual assault allegations against the star "categorically false." *(Photo: Mike Marsland, WireImage)*

The actor-director whose *Rocky* franchise saw a rebirth with 2015's *Creed*, is facing reports of sexual assault from the late 80s. An old police report detailed by the *Daily Mail (http://www.dailymail.co.uk/news/article-5081605/Sylvester-Stallone-accused-forcing-teen-threesome.html)* and the *Baltimore Post-Examiner* (http://baltimorepostexaminer.com/sylvester-stallone-accused-30-years-ago-allegedly-group-sex-teen-police-say/2016/02/16) website indicates an unnamed teen, then 16, consented to sex with Stallone in Las Vegas in 1986. But she told police she did not consent to group sex after Stallone invited his bodyguard to join them. She said she felt intimidated into having sex with both of them. Under Nevada law, the age of consent is 16. "This is a ridiculous, categorically false story," his rep, Michelle Bega, told USA TODAY. Meanwhile, a second woman has stepped forward (/story/life/people/2017/12/21/sylvester-stallone-categorically-disputes-sexual-assault-claim-second-accuser/974418001/), reportedly filing a police report last month in Santa Monica, Calif.

Lockhart Steele

The editorial director for Vox Media was fired for harassment (http://money.cnn.com/2017/10/20/media/vox-media-fires-editorial-director-lockhart-steele/index.html) following allegations made by a former employee. In a Medium post from Eden Rohatensky, a former web developer at Vox Media, she said a VP caressed her hand and kissed her neck while in the back of an Uber. "Lock admitted engaging in conduct that is inconsistent with our core values and is not tolerated at Vox Media," said CEO Jim Bankoff in a memo to employees, *Variety* reports (http://variety.com/2017/digital/news/vox-media-lockhart-steele-fired-sexual-harassment-1202595146/).

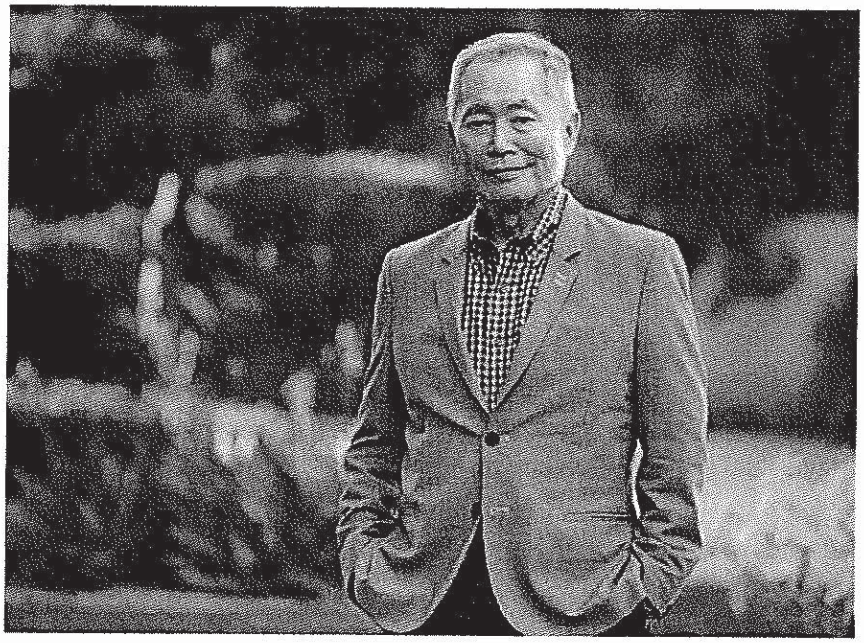
Oliver Stone



Oliver Stone speaks during a press conference of the New Currents Jury at the Busan International Film Festival (BIFF) in Busan, South Korea, on Oct. 13, 2017. *(Photo: JEON HEON-KYUN, EPA-EFE)*

Carrie Stevens, an actress and former Playboy model, alleged the Oscar-winning director grabbed her breast during a party, she tweeted and detailed to *The Hollywood Reporter* (https://www.hollywoodreporter.com/news/oliver-stone-accused-groping-tv-actress-early-1990s-1048468) and *New York Daily News*. Meanwhile, actress Melissa Gilbert said she felt "humiliated" (/story/life/people/2017/11/21/melissa-gilbert-says-oliver-stone-humiliated-her-in-audition-for-the-doors/884074001/) following an audition for the 1991 film *The Doors*, which Stone directed. "The whole scene was just my character on her hands and knees saying, 'Do me, baby.' Really dirty, horrible," Gilbert said. "Then he said, 'I'd like you to stage it for me.'" In a statement, Stone said actors were told the audition process would be intense.

George Takei



'Star Trek' original cast member George Takei denies the claim of former model Scott R. Brunton alleging Takei groped him in the actor's Los Angeles condominium in 1981. *(Photo: USA TODAY)*

The *Star Trek* actor and social activist was accused of sexually assaulting former model Scott R. Brunton, according to an interview published by *The Hollywood Reporter* on Nov. 10 (http://www.hollywoodreporter.com/news/george-takei-accused-sexually-assaulting-model-1981-1056698?utm_source=twitter&utm_source=t.co&utm_medium=referral&utm_source=t.co&utm_medium=referral). Brunton alleges Takei groped him in the actor's

ngeles condominium in 1981. Takei denied the allegations (/story/life/people/2017/11/11/george-takei-sexually-assault-accusation/854433001/) in a series of tweets on Nov. 11, writing, "The events he describes back in the 1980s simply did not occur, and I do not know why he has claimed them now."

Jeffrey Tambor

The *Transparent* actor was accused of engaging in inappropriate behavior by his former assistant, a transgender woman named Van Barnes, according to a *Deadline* report (http://deadline.com/2017/11/jeffrey-tambor-sexual-harassment-claims-amazon-1202204220/) on Nov. 8. Tambor, who plays a trans woman on the hit show, rejected the claims, calling Barnes' allegations "baseless." Tambor was also accused of sexual misconduct (/story/life/people/2017/11/16/transparent-trace-lysette-jeffrey-tambor/873288001/) by *Transparent* star Trace Lysette in a Nov. 16 report from *The Hollywood Reporter*. Amazon Studios has initiated an investigation into the allegations, Amazon spokesperson Craig Berman confirmed to USA TODAY. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Jack Tate

A woman told NPR affiliate KUNC (http://www.kunc.org/post/colorado-senators-baumgardner-and-tate-named-allegations-sexual-harassment) the Colorado senator was inappropriate with her repeatedly over a period of two-and-a-half months in 2016, when she was 18. A formal complaint (http://aspenpublicradio.org/post/sen-jack-tate-fourth-colorado-lawmaker-accused-sexual-harrassment) has been filed. Tate denied wrongdoing, reports KUNC.

Ike Taylor

The former pro football player was suspended as an analyst (/story/sports/nfl/2017/12/12/nfl-network-suspends-analysts-over-sexual-misconduct-suit/108532946/) by the NFL Network after a former wardrobe stylist accused him of misconduct in a lawsuit. He has yet to respond to the claim.

Glenn Thrush

Several women accused the White House reporter for The New York Times of sexually inappropriate behavior, reports Vox (/story/news/politics/2017/11/20/new-york-times-suspends-star-reporter-glenn-thrush-after-sexual-misconduct-allegations/880955001/). The report's author, Laura McGann, claimed Thrush came on to her at a bar and she had to quickly leave. McGann said she believes he later disparaged her to their newsroom colleagues. The Times said it will suspend Thrush while it investigates the matter. "Over the past several years, I have responded to a succession of personal and health crises by drinking heavily," said Thrush in a statement to Vox. "During that period, I have done things that I am ashamed of, actions that have brought great hurt to my family and friends."

James Toback

Director James Toback attending the photocall of the movie "The Private Life of a Modern Woman" presented out of competition at the 74th Venice Film Festival. *(Photo: Tiziana Fabi, AFP/Getty Images)*

The screenwriter and film director (*The Pick-up Artist*, *Two Girls and a Guy*), was accused of sexually harassing over 300 women, according to reports from the *Los Angeles Times* (http://beta.latimes.com/entertainment/movies/la-et-mn-selma-blair-rachel-mcadams-james-toback-20171026-story.html) on Oct. 27. The *Times* says 31 of the women spoke on the record about their encounters with Toback, which go back decades, and more than 270 have contacted journalist Glenn Whipp (http://beta.latimes.com/entertainment/movies/la-et-mn-toback-follow-up-20171023-story.html) with similar claims.

Adam Venit

The agent faces a lawsuit from Terry Crews (/story/life/people/2017/12/05/terry-crews-sues-hollywood-agent-he-says-groped-him/925510001/) for allegedly groping the actor at an industry event in 2016. Crews said in the lawsuit he shoved Venit after the agent grabbed his penis and testicles. "I have never felt more emasculated, more objectified, I was horrified," Crews said during an interview (/story/life/people/2017/11/15/terry-crews-opens-up-alleged-assault-good-morning-america-interview/865631001/) on *Good Morning America*.

Bruce Weber

Fashion photographer Bruce Weber has been accused (http://www.tmz.com/2017/12/05/fashion-photographer-bruce-weber-sexual-harassment-allegations/) by models Jason Boyce and Mark Ricketson of forcing them to touch their own genitals, they announced in a news conference with attorney Lisa Bloom on Dec. 5.

Kirt Webster

Webster Public Relations CEO Kirt Webster has been accused of sexual assault by one woman. The firm has been renamed and Webster is "taking time away."

Bob Weinstein

The film producer and brother of Harvey Weinstein has been accused of harassing TV producer Amanda Segel. In a statement, Spike TV told the Associated Press (/story/life/movies/2017/10/17/bob-weinstein-accused-sexually-harassing-female-tv-producer/773055001/) that the network is investigating the allegations by Segel, the showrunner on its adaptation of Stephen King's *The Mist*. According to a story published Oct. 17 by *Variety* (http://variety.com/2017/tv/news/bob-weinstein-sexual-harassment-1202592165/), Weinstein invited her to dinner, to his home and to a hotel room during a three-month period in the summer of 2016.

Harvey Weinstein

The film producer (*Shakespeare in Love*, *Emma*), was accused of decades of alleged sexual harassment and assault in bombshell reports from the *New York Times* (https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0) and *New Yorker* (https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories) in early October. The list of his accusers (/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/) now totals 83 women, includes actresses Angelina Jolie, Gwyneth Paltrow and Rose McGowan. In wake of the allegations, Weinstein resigned from the company board of directors on Oct. 17. He has also filed suit against the Weinstein Company in an attempt to gain access to his emails and personnel file for the purpose of defending himself, the *Associated Press* reports.

Fullscreen

Harvey Weinstein's opulent Hollywood career

Matthew Weiner

The creator of hit series *Mad Men* was accused of sexual harassment by *Mad Men* staff writer Kater Gordon in an interview with *The Informatio* (https://www.theinformation.com/articles/former-mad-men-writer-starts-nonprofit-after-alleged-harassment?jwt=eyJhbGciOiJIUzI1NiJ9.eyJzdWIiOiJzaGFyZnphY2tAZ21haWwuY29tIiwiZXhwIjoxNTQxODIxNjg2LCJuIjoiR3Vlc3QiLCJzY29wZSI6WyJzaGFyZSJdfQ.xM_YG Nov. 9. In the interview, she alleges Weiner told her late one night she "owed it to him to let him see her naked." She says she didn't report the comment officially because she was afraid of losing her job. A year after the incident, Gordon was let go from *Mad Men*. Weiner's spokeswoman said in a statement to *The Information*, "Mr. Weiner spent eight to ten hours a day writing dialogue aloud with Miss Gordon, who started on Mad Men as his writers assistant. He does not remember saying this comment nor does it reflect a comment he would say to any colleague."

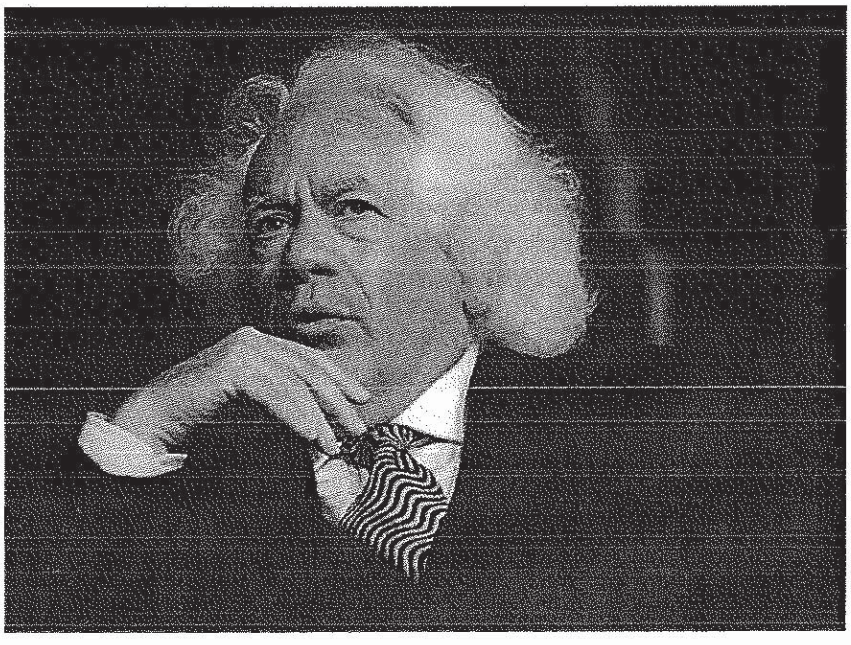
Jann Wenner

Rolling Stone publisher Jann Wenner was accused by one man of sexual harassment. He says he did not intend to make the accuser uncomfortable.

Ed Westwick known for his role on Gossip Girl is accused of sexual misconduct by two women. Actress Kristina Cohen accused Westwick in a Facebook post Nov. 6, of raping her at his house three years ago and filed a Hollywood police on Nov. 7. Westwick denied the allegations, tweeting on Nov. 7, "I do not know this woman. I have never forced myself in any manner, on any woman. I certainly have never committed rape." Rachel Eck accused him of groping her and unwanted advances in a Buzzfeed report on Nov. 14. *(Photo: FREDERIC J. BROWN, AFP/Getty Images)*

The *Gossip Girl* actor was accused of rape by actress Kristina Cohen, who filed a report of sexual assault with the Hollywood police station on Nov. 7, LAPD spokesman Drake Madison confirmed to USA TODAY (/story/life/people/2017/11/07/lapd-investigating-ed-westwick-allegations/842440001/). Cohen accused Westwick in a Facebook post (https://www.facebook.com/kristina.kruz.5/posts/10211729772336179) Nov. 6, which claimed he raped her at his house three years ago. Westwick has denied the allegations, tweeting on Nov. 7 (https://twitter.com/EdWestwick/status/927940546382913536), "I do not know this woman. I have never forced myself in any manner, on any woman. I certainly have never committed rape." Westwick was also accused of unwanted advances and groping by Rachel Eck in a *Buzzfeed* report (https://www.buzzfeed.com/mbvd/a-third-woman-says-gossip-girl-star-ed-westwick-sexually?utm_term=.psJYq2Ge1#.tn9aYKj0w) on Nov. 14. (https://www.facebook.com/jurvetson/posts/10159616207180611?pnref=story)

Leon Wieseltier



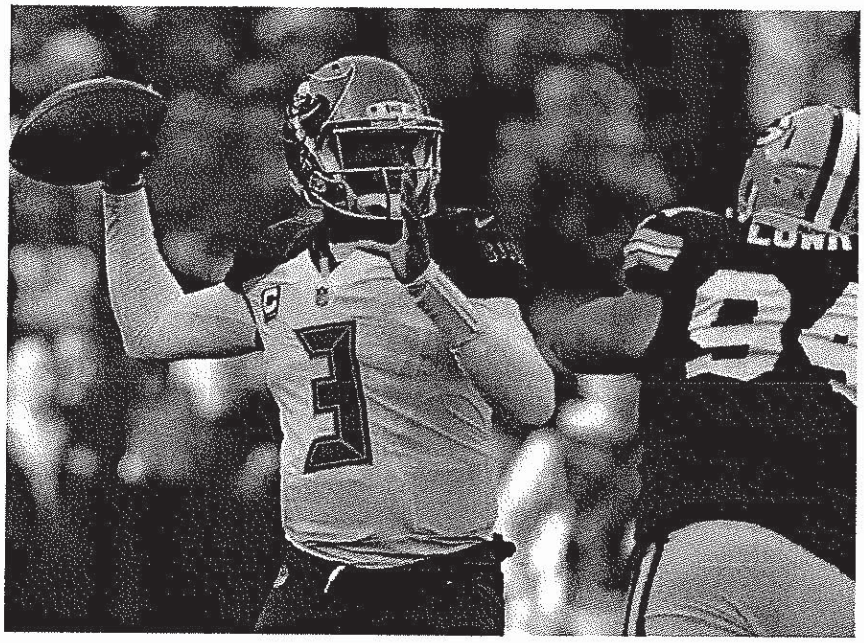
One-time New Republic literary editor Leon Wieseltier apologized to past staffers for behavior that accusers say included inappropriate touching. The Emerson Collective immediately pulled its support for a magazine Wieseltier was set to publish. *(Photo: June 9, 2013 photo by AP)*

The former *New Republic* editor and senior fellow at The Brookings Institution was at the center of several stories about his conduct from former female employees at the publication, reports Politico (https://www.politico.com/story/2017/10/24/leon-wieseltier-new-republic-emerson-collective-workplace-conduct-244120). Emerson Collective cut ties with Wieseltier, reported Politico, while The Brookings Institution suspended Wieseltier without pay, according to the Washington Post (https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/10/25/brookings-institution-suspends-leon-wieseltier-without-pay/?utm_term=.c4ed8c2e1534). "For my offenses against some of my colleagues in the past I offer a shaken apology and ask for their forgiveness," Wieseltier said in a statement.

Brendan Williams

Former Washington state Rep. Brendan Williams has been accused of four women of harassing or assaulting them while he was in office from 2005-2010.

Jameis Winston



(Photo: The Associated Press)

The Tampa Bay Buccaneers quarterback was accused by an Uber driver of groping, reports Buzzfeed (https://www.buzzfeed.com/talalansari/jameis-winston?utm_term=.oh0nQIX9V#.ycMk0XOEY). The National Football League said it is investigating the matter (/story/sports/nfl/2017/11/17/nfl-reviewing-allegation-jameis-winston-groped-uber-driver/107784674/). In a statement from representative Russ Spielman, Winston denies the allegations.

Steve Wynn

The casino mogul resigned as finance chair of the Republican National Committee (/story/news/politics/2018/01/27/steve-wynn-sexual-misconduct-allegations-could-hurt-gop/1071968001/) following allegations of sexual assault. According to *The Wall Street Journal*, Wynn engaged in sexual misconduct with company employees spanning decades. Wynn has vigorously disputed the accusations.

Gregg Zaun

The former Major League Baseball player who was a Toronto Blue Jays analyst for Sportsnet, was fired for "inappropriate behavior and comments" toward female employees, Rogers Media announced (/story/sports/mlb/bluejays/2017/11/30/blue-jays-analyst-gregg-zaun-fired-inappropriate-behavior/911861001/) Nov. 30. Zaun, 46, had played for nine major league teams over 16 seasons.

Matt Zimmerman

News booker Matt Zimmerman was accused of inappropriate conduct by multiple women at the network. He was fired from NBC.

Contributing: Associated Press

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Employment Law Lookout

Insights for Management

Sexual Harassment Legal Settlements: What Employers Need to Know About the New Tax Act

By **Seyfarth Shaw LLP** on February 6, 2018

POSTED IN RETAIL, TAX

By **Paul S. Drizner** and **Michael D. Fleischer**

Seyfarth Synopsis: *The new Tax Act prohibits employers from deducting payments to individuals alleging sexual harassment or sexual abuse if the settlement or payment requires the Claimant to execute a nondisclosure agreement.*

The #MeToo movement continues to have a significant impact on all employers, forcing human resource professionals to review their protocols for preventing, reporting and investigating sexual harassment claims. Now, Congress has passed the **Tax Cuts and Jobs**

Act (the "Tax Act"), which may make sexual harassment settlements more expensive for employers who seek to keep these settlements private.

Under current tax law, an employer may deduct the ordinary and necessary expenses it incurs in carrying on its trade or business. This deduction generally includes legal settlements or payments to a plaintiff (including plaintiff's attorney fees) and any legal fees the employer has incurred for its defense.

There has been an outcry by high profile victims' advocates who have characterized confidentiality payments in settlements as "hush money" arguing that they mask inappropriate corporate conduct. In response, Congress included a provision in the Tax Act which is aimed directly at deterring employers from using nondisclosure agreements in sexual harassment settlements. Pursuant to new Internal Revenue Code Section 162(q), the government will no longer permit employers to deduct "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement" or "attorney's fees related to such a settlement or payment."

Implications and Challenges

New Section 162(q) has important implications for employers but there remain a number of questions regarding its application. We expect the IRS to issue guidance in the future which will clarify some of the current ambiguities, but employers must devise a plan now for new legal settlements since Section 162(q) applies to payments made after December 22, 2017.

First, the price for confidentially just increased. When an employer settling a sexual harassment claim includes a nondisclosure provision in the agreement, it will be unable to deduct any payments related to the matter, including the settlement payment and attorney's fees. This may backfire on the Plaintiff's Bar, because there are certainly instances where the plaintiff desires confidentiality for a variety of reasons, including that publication of the agreement may make it more difficult for the plaintiff to find another job. In cases where the plaintiff desires confidentiality more than the employer, the employer may use this leverage to lower its settlement offer, essentially charging the plaintiff for the additional cost of confidentiality.

Second, the broad language of the statute makes it uncertain whether the IRS will consider payments made pursuant to a confidential agreement that does not settle sexual harassment

claims but which contains a broad waiver of claims, including for sexual harassment, as "related to sexual harassment" and, thus, preclude the deduction. Unfortunately, we do not know the answer yet. Until this issue is clarified, employers may want to consider adding a provision to their settlement agreements by which the parties acknowledge that even though the claimant is waiving a broad range of potential claims, there was no claim of sexual harassment or sexual abuse and none of the settlement payments are related to such claims.

It is also unclear exactly which deductions the IRS is precluding in connection with the confidential settlement of a sexual harassment claim. The statute is clearly intended to apply to the settlement payment itself, as well as attorney's fees. But what about other payments? If an employer hires an investigator or expert to assist with its case, are those costs deductible? What if the employer provides outplacement services for the plaintiff or pays the plaintiff's COBRA premiums, are those costs deductible? Finally, if an employer has Employer Professional Liability Insurance and the insurance carrier makes the settlement and/or attorney's fees payment, will the insurance company be denied a deduction for those payments? These are questions that will hopefully be answered with future official guidance. Plaintiffs often bring sexual harassment claims along with other discrimination claims like age and race. We will need the IRS to clarify whether a portion of the settlement may be allocated to sex harassment, so that the employer may deduct remaining payments.

Third, the statute explicitly provides that attorney's fees related to the confidential settlement of a sexual harassment or sexual abuse matter are not deductible. This provision creates separate implications for both plaintiffs and employers.

We read the new statute to prohibit any deduction for an employer's own attorney's fees incurred for defense, or the payments made to the plaintiff's attorneys. The provision would also seem to prohibit a plaintiff from deducting any attorney's fees the plaintiff pays to his or her attorneys. A plaintiff has income if the employer pays his or her attorney's fees. In the past, a plaintiff was generally allowed to deduct the amount of the plaintiff's attorney's fees that the employer paid, resulting in no net income to the plaintiff for the attorney's fees. The broad language of new Section 162(q) appears to change that general rule and prohibit a plaintiff from deducting the attorney's fees the employer paid. As such, the plaintiff may now owe tax on income that the plaintiff never received and this will significantly reduce his or her net recovery.

Although it is unlikely that Congress intended to place a tax burden on plaintiffs who raise sexual harassment claims, there is no clear guidance on these issues. As a result, until the IRS issues further clarification, plaintiffs may look to employers to cover their additional tax liability, which will add to the cost of settlement and make negotiations more difficult.

The result of all of this is that employers will have to carefully evaluate the cost/benefit of confidentiality. It will remain important to continue to monitor developments concerning the new tax law and incorporate the issues discussed above into the legal and financial analysis when settling cases involving sexual harassment or sexual abuse.

Seyfarth Shaw will provide further alerts as new developments occur.

For more information on this topic, please contact the authors, your Seyfarth Attorney, or any member of Seyfarth Shaw's **Retail**, **Tax**, or **Labor & Employment** Teams.

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MORALS CLAUSES: PAST, PRESENT AND FUTURE

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This note argues that morals clauses remain important in talent contracts, despite the liberalization of the modern moral climate. Morals clauses, express and implied, are employed to terminate a contract when talent misbehaves. These clauses have a storied history, but are still relevant despite the considerable changes in social norms since they were first implemented. These clauses are applicable to various sectors of the entertainment industry, including motion picture, television, athletics, and advertising. Their popularity has also led to the implementation of reverse morals clauses, which protect the employee from improprieties of the employer. The outgrowth of Internet and social media has only made such clauses more important, by providing more opportunities for talent misbehavior and public embarrassment. This note finds that morals clauses remain relevant, effectual, nuanced, and flexible, well suited to adapt to a changing legal and cultural landscape.

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INTRODUCTION

Imagine you are the chief executive of a major news network. You have just signed a multi-million dollar contract with your top news anchor, Fred Fabricate. Just as you are congratulating yourself on your shrewd negotiations, you notice a troubling headline trending on Facebook, Twitter, and your Daily Beast Cheat Sheet: "Fred Fabricate's Web of Lies!" According to the articles, your golden boy has falsified details of past news reports. You call your lawyers in distress, and thankfully they have a solution. Fabricate has a morals clause in his contract with the network, and his conduct is grounds for termination of the agreement. You sigh in relief, thankful that this disaster can be resolved with minimal financial liability.

This example is adapted from the recent fallout surrounding Brian Williams and NBC News. Unfortunately for NBC, the separation was not as seamless as the hypothetical above. Williams has been a presence on the Network since 1993, and

was a rare bright spot in the struggling network news industry.[1] Since the revelations of Williams' exaggerations of his experiences in Iraq, NBC has scrambled to perform damage control for their popular Nightly News program.[2] Initially, Williams issued a public apology and stepped away from the show for several days.[3] Then, rumors began to swirl that Williams' embellishments went beyond this singular occurrence. A six-month suspension without pay quickly followed.[4] Ultimately, Williams was jettisoned to MSNBC, NBC's ratings-challenged cable analogue.[5] Concerns remain whether Williams can "win back the trust of both his colleagues and his viewers . . . [and] abide by the normal checks and balances that exist" for those in the news industry.[6] The incident "set off a debate about the level of trustworthiness required from someone who explained the world to nearly 10 million people a night"; however, NBC's primary concern was "protecting the integrity of its news operation, once called the crown jewel of the company."[7] NBC made clear that the incident provided a right to terminate Williams pursuant to the morals clause in his personal services contract.

The Fabricate hypothetical and its real-life counterpart are merely illustrations of how a morals clause might be activated in a talent contract. A morals clause is:

> A contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.[8]

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[1] *See* Emily Steel, *Brian Williams Scandal Prompts Frantic Efforts at NBC to Curb Rising Damage*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/business/media/frantic-efforts-at-nbc-to-curb-rising-damage-caused-by-brian-williams.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Emily Steel, *Brian Williams Return is Part of Revamp at MSNBC*, N.Y. TIMES (Sept. 21, 2015), http://www.nytimes.com/2015/09/22/business/media/williams-return-is-part-of-revamp-at-msnbc.html.

[6] *Id.* (internal quotation marks omitted).

[7] Steel, *supra* note 1.

[8] Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

The television, motion picture, athletic, and advertising industries all include morals clauses in talent agreements.[9]

The value of a morals clause lies in the protection it provides to the contracting company.[10] Companies employ talent to achieve "meaning transference"; they aim to use a "'celebrity's established familiarity and credibility' to make a product [or] project 'similarly familiar and credible' to consumers."[11] Unfortunately, meaning transference cannot be limited to only positive associations with talent; incidental transfers of negative meanings may also occur when talent misbehaves in a professional or personal context.[12] Businesses spend considerable sums of money to cultivate the ideal image, and negative associations can wreak havoc upon their efforts.[13] Because a morals clause allows the contracting company to swiftly sever its relationship with troublesome talent,[14] it is an excellent form of corporate protection.[15]

This note will argue that morals clauses remain essential and influential in entertainment contracts of all kinds, despite the considerable changes in social norms since they were first implemented, and the obstacles such changes represent. Part I will begin with a discussion of the history of morals clauses. Part II will examine the two categories of morals clauses: express and implied. Part III will address the use of morals clauses in various sectors of the entertainment industry: motion picture, television, athletics, and advertising. Part IV will discuss the outgrowth of reverse morals clauses, which protect the employee from improprieties of the employer. Part V will address drafting concerns, and Part VI will explore the implications of social media and the current moral climate.

I
HISTORY OF MORALS CLAUSES

Despite the increasing prevalence of cases involving morals clauses in the public consciousness, the clauses themselves are not new and history provides

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[9] Noah B. Kressler, *Using The Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 239 (2005).

[10] *See* Sarah D. Katz, "*Reputations….A Lifetime to Build, Seconds to Destroy": Maximizing Mutually Protective Value of Morals Clauses in Talent Agreements,* 20 CARDOZO J. INT'L & COMP. L. 185, 187 (2011).

[11] *Id.* at 190.

[12] *Id.* at 191.

[13] *See* Margaret DiBianca, *Bad Boys, Bad Boys: Whatcha Gonna Do When They Work for You?,* 13 No. 2 DEL. EMP. L. LETTER 1 (2008).

[14] Katz, *supra* note 10, at 192.

[15] *See* Pinguelo & Cedrone, *supra* note 8, at 366–67.

important context in understanding them. Morals clauses were successful and unabashed contract mechanisms used not only to sever contracts due to moral misconduct, but also to censor political activity.

The seminal case that triggered the use of morals clauses in talent contracts, was the moral impropriety of Fatty Arbuckle.[16] In 1921, Comedian Roscoe "Fatty" Arbuckle had just signed a three-year, three-million-dollar contract with Paramount Pictures when a female guest at his party was found severely injured in his hotel suite.[17] After the guest died from her injuries,[18] Arbuckle was arrested on rape and murder charges, turning public opinion against the previously beloved performer.[19] Although he was ultimately acquitted at trial, the court of public opinion had already made its damning judgment.[20] Universal Studios was not involved with the Arbuckle case, but the fallout from the incident inspired Universal to begin including morals clauses in all of their talent contracts.[21]

During the late 1940s and 1950s, movie studios more frequently used the clauses to challenge political expression than immoral conduct.[22] For example, morals clauses were used as grounds for dismissal of controversial talent known as the Hollywood Ten.[23] These ten influential actors and screenwriters were jailed and blacklisted by big movie studios for publicly denouncing the activities of the House Committee on Un-American Activities (HUAC) during its investigation of Communist influence in Hollywood at the height of the McCarthy Era.[24] "Fearing

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[16] *See* Pinguelo & Cedrone, *supra* note 8, at 354.

[17] *Id.*

[18] The guest, Virginia Rappe, died of a ruptured bladder. It was speculated that the 266 pound Arbuckle had crushed her bladder while sexually assaulting her. Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN MAG. (Nov. 8, 2011), http://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/.

[19] Pinguelo & Cedrone, *supra* note 8, at 354.

[20] *See* King, *supra* note 18.

[21] "As a direct result of the Arbuckle case in San Francisco, Stanchfield & Levy, attorneys for the Universal Film Manufacturing Company, have drawn up a protective clause . . . to [be] inserted in all existing and future actors', actresses', and directors' contracts with the company." Pinguelo & Cedrone, *supra* note 8, at 354; *see also Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, at 8, *available at* http://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8.

[22] Pinguelo & Cedrone, *supra* note 8, at 355.

[23] *Id.*

[24] "During the investigative hearings, members of HUAC grilled the witnesses about their past and present associations with the Communist Party . . . [M]ost individuals either sought leniency by cooperating with investigators or cited their Fifth Amendment right against self-incrimination. . . [T]he Hollywood Ten[] not only refused to cooperate with the investigation but denounced the HUAC anti-communist hearings as an outrageous violation of their civil rights, as

widespread boycotts amid a shrinking market share of consumer leisure spending, studios used the morals clause, a customary clause in talent agreements for twenty-five years, to terminate and disassociate themselves from the scandalized Hollywood Ten."[25] The controversial activity and its perceived impact on the studio's image were cited as grounds for their dismissal. [26]

The three most notorious of the Hollywood Ten cases were litigated before the Ninth Circuit Court of Appeals between 1947 and 1957 and are referred to as the "Hollywood Ten Trilogy."[27] In *Loew's, Inc. v. Cole*,[28] MGM[29] dismissed a member of the Hollywood Ten, Lester Cole, more than a month after he testified before HUAC.[30] Cole sued MGM based on the suspicious delay between his testimony and firing, but the Ninth Circuit ruled that the damage dealt to the studio's image was sufficient grounds for his dismissal.[31] The parties eventually settled the case.[32] The other two cases in the trilogy, *Twentieth Century-Fox Film Corp. v. Lardner*[33] and *Scott v. RKO Radio Pictures, Inc.*,[34] relied on similar reasoning, finding in favor of the studios at the expense of Fox writer, Lardner, and RKO producer and director, Scott. In both cases, the courts relied on *Cole*'s rationale that "the natural result of the artist's refusal to answer the committee's

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the First Amendment to the U.S. Constitution gave them the right to belong to any political organization they chose." *Hollywood Ten*, A+E NETWORKS (2009), http://www.history.com/topics/cold-war/hollywood-ten.

[25] Kressler, *supra* note 9, at 238.

[26] For example, RKO's letters of dismissal to Adrian Scott and Edward Dmytryk, two members of the Hollywood Ten, stated: "By your conduct . . . and by your actions, attitude, public statements and general conduct . . . you have brought yourself into disrepute with large sections of the public, have offended the community, have prejudiced this corporation as your employer and the motion picture industry in general, have lessened your capacity fully to comply with your employment agreement and have otherwise violated your employment agreement with us." THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:107 (3d ed. 2014).

[27] Pinguelo & Cedrone, *supra* note 8, at 358.

[28] Loew's, Inc. v. Cole, 185 F.2d 641, 645 (9th Cir. 1950).

[29] MGM was the trade name for Loew's at the time. Pinguelo & Cedorone, *supra* note 8, at 358.

[30] SELZ ET AL., *supra* note 26, at § 9:107.

[31] Pinguelo & Cedrone, *supra* note 8, at 359. The court opined, "[a] film company might well continue indefinitely the employment of an actor whose private personal immorality is known to his employer, and yet be fully justified in discharging him when he so conducts himself as to make the same misconduct notorious." *Cole*, 185 F.2d at 658.

[32] Pinguelo & Cedrone, *supra* note 8, at 359.

[33] Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954).

[34] Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957).

questions was that the public would believe he was a Communist."[35] Because much of the population was opposed to communism, this was considered a violation of the express morals clause, and constituted grounds for termination.[36]

In recent decades, morals clauses have become even more common in talent contracts, but the changing moral landscape has posed challenges to their efficacy and legality. Nonetheless, the growth of social media, the greater publicity given to once private information, and the speed with which private information is disseminated have augmented the need for morals clauses.[37]

II
TYPES OF MORALS CLAUSES

There are two basic types of morals clauses, express and implied. Each represents different considerations on the part of the talent and the contracting company and each poses unique interpretative challenges.

A. Express Morals Clauses

Express morals clauses are drafted as part of the employment agreement. A typical express morals clause reads as follows:

> The spokesperson agrees to conduct herself with due regard to public conventions and morals, and agrees that she will not do or commit any act or thing that will tend to degrade her in society or bring her into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the [contracting company] in general. [Contracting company] shall have the right to terminate this Agreement if spokesperson breaches the foregoing.[38]

Clauses can range widely based on the talent and contracting company involved, as well as the context of the agreement.[39] The standard punishment for violation of a clause under New York and California Law, where the clauses are frequently invoked, is termination of the agreement.[40]

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[35] Kressler, *supra* note 9, at 245.
[36] *Id.*
[37] *See* discussion *infra* Part VI.
[38] Sarah Osborn Hill, *How to Protect Your Brand When Your Spokesperson Is Behaving Badly: Morals Clauses in Spokesperson Agreements*, 57 FED. LAW 14, 14 (2010).
[39] *See* Kressler, *supra* note 9, at 251–54.
[40] *Id.* at 244.

New York and California case law define the scope of behavior prohibited by morals clauses, which goes beyond a mere requirement to obey the law, and includes a duty "to refrain from behavior that tends to 'shock, insult, and offend the community and public morals and decency,' bring the artist into 'public disrepute, contempt, scorn and ridicule,' or hurt or prejudice the interests of, lower the public prestige of, or reflect unfavorably upon, the artist's employer or the industry in general."[41] *Loew's, Inc. v. Cole, Twentieth Century-Fox Film Corp. v. Lardner, Scott v. RKO Radio Pictures, Inc.*,[42] and *Nader v. ABC Television Inc*.[43] are the primary cases exploring morals clauses in talent contracts under contract law principles[44] and help illustrate how an express morals clause operates.[45]

Compliance with express morals clauses is difficult because their requirements can be unpredictable, a problem that is further exasperated by the tremendous consequence of violating the clause. When talent knows an express morals clause is included in their contract, it is in their interests to moderate their actions to minimize the possibility of breach. However, moderation is not always easy. For instance, the members of the Hollywood Ten probably would have risked termination based on the slightest opposition to HUAC, because of the political tenor of the times.[46] In *Nader*, violation of the "disrepute" trigger would be impossible to predict ex-ante because the reviewing court only found it enforceable after external review, based upon an inherently unpredictable reasonableness standard.[47] Therefore, this lack of predictability can present distinct challenges to talents' compliance with an express morals clause.

Because of the cost and unpredictability of morals clauses, they can be a point of contention between artists and employers in contract negotiations. Given

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[41] *Id.* at 244– 45.

[42] *See* discussion *supra* Part I.

[43] Nader v. ABC Television Inc., 150 F. App'x. 54; *see* discussion *infra* Section III(i).

[44] Pinguelo & Cedrone, *supra* note 8, at 358. Although some other cases have involved morals clauses in contracts, they were not resolved on these grounds. *Id.* at 358 n. 57; s*ee, e.g.*, Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth., 971 F. Supp. 875, 887 (D.N.J. 1977) (deciding the case primarily on First Amendment grounds); Vaughn v. Am. Basketball Assoc., 419 F. Supp. 1274, 1278-79 (S.D.N.Y. 1976) (deciding the case based on jurisdictional issues), and Revels v. Miss N.C. Pageant Org., 627 S.E.2d 280, 284 (N.C. Ct. App. 2006) (ordering the case to be resolved in arbitration).

[45] Lardner, Scott, and Cole each had contracts containing a similar morals clause. Kressler, *supra* note 9, at 245.

[46] *See* Pinguelo & Cedrone, *supra* note 8, at 361-62.

[47] Katz, *supra* note 10, at 214. Sometimes it is unclear to talent whether they are violating a morals clause. For example, Nader had previously maintained his job despite arrests, making him believe this case would not be handled differently. *See id.*

that the current moral climate is more socially liberal than eras past,[48] many employers no longer require them and will delete them if necessary in a negotiation.[49] However, if a morals clause is necessary, there are several ways for companies to reduce the impact of a morals clause.[50] Lawyers can draft morals clauses to require plaintiffs to show evidence of a negative reaction before the court will find a violation. [51]

In addition to contractual limitations on morals clauses, state law can also impact their enforceability. New York and California provide the broadest protections for employees and do not allow employers to make decisions based on an employee's lifestyle.[52] In contrast, Delaware does not have any laws of this nature, meaning that unless the basis of termination is a protected characteristic such as race, religion, gender or age, the employer can be the judge of conduct warranting termination.[53] In all states, clauses that improperly infringe on a performer's rights, such as First Amendment rights guaranteed by the United States Constitution, are not permitted.[54]

Although express morals clauses remove some of the ambiguity associated with permissible employee behavior, lack of predictability as to when they might be triggered undoubtedly persists. As social norms continue to shift and evolve, this issue will only become more acute.

B. Implied Morals Clauses

Morals clauses can also be implied from principles of common law, which impose a duty upon talent to refrain from activities that are detrimental to the employer or that might devalue the talent's performance.[55] Whether a morals clause should be implied is a question of fact, and requires an evaluation of the

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[48] *See* discussion *infra* Section VI(A).

[49] SELZ ET AL., *supra* note 26, at § 9:107.

[50] *Id.*

[51] For example, "the words 'tend to' and 'may' [can] [be] removed, so that a demonstrably negative reaction is required before the clause can be triggered," and "most companies will agree to remove the right to terminate employment so that the only remedy is the right to remove a credit." *Id.*

[52] DiBianca, *supra* note 13.

[53] *Id.*

[54] *See, e.g.*, Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth., 971 F. Supp. 875, 887 (D.N.J. 1977) (holding New Jersey Sports and Exhibition Authority's requirement that performers agree to a morals clause problematic from a constitutional First Amendment standpoint); *see also* Pinguelo & Cedrone, *supra* note 8, at 377.

[55] Kressler, *supra* note 9, at 246.

circumstances of the employment and conduct at issue.[56] Under both New York and California law this obligation of good conduct is considered an implied morals clause and is recognized as grounds to terminate an employment agreement.[57] Importantly, an implied moral obligation does not arise solely in the absence of an express provision; rather, these common law duties exist alongside any provisions in an employment agreement.[58]

There are hurdles to establishing this implied duty. Principally, an implied morals clause requires a common law employment relationship, which is more difficult to establish in the current film industry than it was in the past for several reasons. One reason for this is the shift from the "star system," which engendered exclusive contracts between talent and studios, to the "free agency system," where actors work with many studios and function more like independent contractors than common law employees.[59] Another reason is that the tax-motivated system of creating "loan out" corporations challenges the employment relationship. "Loan outs" contract directly with studios to provide the personal services of the actor. This arrangement potentially destroys privity between the studio and actor by making the actor the common law employee of the loan-out rather than the studio.[60] Nonetheless, for the purposes of employment law, actors are traditionally considered common law employees, rather than independent contractors in New York and California courts.[61] Furthermore, both jurisdictions disregard the "loan out" when determining if there is an employment relationship.[62]

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[56] *Id.*

[57] *Id.* at 246-47; *see, e.g.*, Drayton v. Reid, 5 Daly's Rep. 442, 444 (N.Y. Ct. Com. Pl. 1874) (holding that an actress's public scandal resulting from immoral conduct was just cause for termination of her employment contract); Scott v. RKO Radio Pictures, Inc., 240 F.2d 87, 89 (9th Cir. 1957) (finding that an employee's conduct before a congressional committee breached "an implied covenant . . . not to do anything which would prejudice or injure his employer").

[58] Kressler, *supra* note 9, at 250; *see also* Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 850 (9th Cir. 1954) (finding that, despite the application of expressio unius, the parties intended to bolster potential remedies, not waive given common law rights, and Fox retained the right to discharge its employee for an unspecified cause).

[59] Kressler, *supra* note 9, at 247-48.

[60] *Id.* at 248; *see generally* Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879 (1995) (discussing the tax considerations of loan-out corporations).

[61] *See* Kressler, *supra* note 9, at 249-50. This is a multi-factor analysis, the most significant factor being the degree of control the employer maintains over the alleged employee. *See, e.g.*, Makarova v. United States, 201 F.3d 110, 114 (2d Cir. 2000) (finding that a performer was an employee because her producer maintained artistic control over her performance); Johnson v. Berkofsky-Barret Prods., Inc., 260 Cal. Rptr. 1067, 1073 (Cal. Ct. App. 1989) (finding an actor

III
APPLICATION OF MORALS CLAUSES IN ENTERTAINMENT INDUSTRIES

Morals clauses are common in many sectors of the entertainment industry. This section will explore the application of morals clauses to the television, motion picture, sports, and advertising industries.

A. Morals Clauses in the Television Industry

Historically, branding has dominated the television industry. Television programming was once entirely dominated by advertisers, who bought time from a network and then created programming.[63] Because the sponsor held a franchise on his time period, network consent was considered pro-forma and"[m]any programs were ad agency creations, designed to fulfill specific sponsor objectives."[64] In the mid-1950s, numerous factors converged to bring an end to sponsor-franchised programming, and control shifted to the networks. Advertisers nonetheless provide the primary support for the medium, and when their support falters, the programming will often change to accommodate them and maintain their backing.[65]

Because of the historical importance of advertising in the television industry, morals clauses are essential to protect advertising relationships, the brand of productions, and company image.[66] "[N]etworks have adopted a conservative bias [toward programming], with no risks and no controversy that would exclude, alienate, or miss parts of the audience."[67] The talent, program, and sponsors are still closely related, and morals clauses are used to quickly sever the connection with talent that poses a threat to public image.[68]

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to be an employee because the production company "directed and supervised the manner in which he performed . . . ").

[62] Kressler, *supra* note 9, at 249; *see, e.g.*, Welch v. Metro-Goldwyn-Mayer Film Co., 254 Cal. Rptr. 645, 655 (Ct. App. 1988) (finding a talent agreement that contained specific obligations between an actor and studio as forming an employment relationship), *rev'd on other grounds*, 769 P.2d 932 (Cal. 1989); *Berkofsky-Barret Prods., Inc.*, 260 Cal. Rptr. at 1072 (holding that the court "need not focus on . . . [that] link in the employment chain").

[63] Kressler, *supra* note 9, at 241.

[64] WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING 108-09, (2d ed. 1997) (quoting ERIK BARNOUW, THE SPONSOR: NOTES ON A MODERN POTENTATE 33 (1978)).

[65] Kressler, *supra* note 9, at 241-42.

[66] Pinguelo & Cedrone, *supra* note 8, at 368.

[67] Katz, *supra* note 10, at 222.

[68] Kressler, *supra* note 9, at 243.

Morals clauses have remained important in the television industry. The effect of these clauses has been shown in high profile terminations of television actors, newscasters, and reality television stars.

1. Television Actors

The Southern District of New York addressed the issue of morals clauses in television actors' contracts in *Nader v. ABC Television*.[69] Michael Nader portrayed Dimitri Marick on "All my Children" from 1991 to 1999. When ABC asked Nader to return to the show in 2000, his agreement contained the network's standard "morals" clause, allowing ABC "to immediately terminate the contract if Nader engaged in conduct that 'might bring [him] into public disrepute, contempt, scandal or ridicule, or which might tend to reflect unfavorably on ABC.'"[70] During the contract Nader was arrested and charged with criminal sale of cocaine and resisting arrest. ABC immediately suspended Nader and he entered rehab.[71] When ABC informed Nader that they were terminating his employment contract for his violation of the morals clause, Nader filed a lawsuit challenging this decision.[72] The court found the morals clause valid, and held that Nader had breached it due to the media coverage of his arrest.[73]

Several other high profile disputes involving television stars' contractual morals clauses have dominated the news in recent years. Most prominent is that of Charlie Sheen, who WBTV fired from its television show "Two and a Half Men" after he exhibited erratic behavior and publicly ridiculed the show's executive producer Chuck Lorre.[74] He challenged his termination in a $100 million lawsuit.[75] This conduct is a classic example of what might fall within a traditional morals clause violation; however, Sheen's contract did not have a traditionally worded

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[69] Nader v. ABC Television, 150 F. App'x 54 (2d Cir. 2005).

[70] *Morals Clause, Not Drug Addiction, Reason for Soap Star's Termination*, 19 No. 4 ANDREWS EMP. LITIG. REP. 12 (2004).

[71] *Id.*

[72] James G. Murphy, *Soap Star Slips Up on Morals Clause in Contract*, 11 No. 10 N.Y. EMP. L. LETTER 7 (2004).

[73] Kressler, *supra* note 9, at 245-46; *see also* Murphy, *supra* note 72 ("The court held, among other things, that the provisions of the morals clause weren't so vague, overly broad, and ambiguous as to render it void.").

[74] Sheen's antics included drug abuse, hospitalization, domestic abuse, rehab, and a series of bizarre interviews and tweets. Emily Yahr, *Let's All Remember the Infamous Charlie Sheen 'Two and a Half Men' Meltdown,* WASHINGTON POST STYLE BLOG (Feb. 19, 2015), https://www.washingtonpost.com/news/style-blog/wp/2015/02/19/lets-all-remember-the-infamous-charlie-sheen-two-and-a-half-men-meltdown/

[75] *Id.*

morals clause.[76] The "moral turpitude clause" in his contract essentially required a felony conviction before termination could be triggered, making the process more complicated.[77] As a result, WBTV relied upon the "force majeure" clause in the contract instead, citing Sheen's incapacitated state as grounds for his termination.[78] The parties eventually settled the case.[79] Another example of a high profile dispute occurred when Mel Gibson made anti-Semitic remarks during an arrest for drunk driving, and ABC subsequently cancelled his contract for their miniseries on the Holocaust.[80] A recent and ongoing example is the mounting allegations of sexual misconduct Bill Cosby is facing, and the considerable media attention it has received, which led NBC and Netflix to shelve planned collaborations with him.[81] Although the Cosby situation does not appear to be a case involving a morals clause, it raises interesting implications for the value and image of Cosby's legacy as America's favorite dad, Heathcliff Huxtable.[82]

Overall, morality clauses in television actors' contracts illustrate the contracting company's concerns with public opinion and most importantly, the talent's ability to work. Because television is dependent on a regimented production schedule and good ratings, factors that might derail filming or sour

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[76] Eriq Gardner, *Charlie Sheen's Contract: Was There Actually a Morals Clause?*, HOLLYWOOD REPORTER (Mar. 8, 2011, 9:13 AM), http://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309.

[77] *Id.*

[78] *Id.*

[79] Nellie Andreeva, *Charlie Sheen, Warner Bros TV & Chuck Lorre Announce Settlement*, DEADLINE HOLLYWOOD (Sept. 26, 2011, 3:12 PM), http://deadline.com/2011/09/charlie-sheen-warner-bros-tv-chuck-lorre-announce-settlement-176345/ (official statement of Warner Bros. studio) ("Warner Bros. Television, Chuck Lorre and Charlie Sheen have resolved their dispute to the parties' mutual satisfaction. The pending lawsuit and arbitration will be dismissed as to all parties. The parties have agreed to maintain confidentiality over the terms of the settlement.").

[80] Pinguelo & Cedrone, *supra* note 8, at 349.

[81] Dorothy Pomerantz, *Netflix and NBC Back Away from Bill Cosby*, FORBES (Nov. 19, 2014, 2:35 PM), http://www.forbes.com/sites/dorothypomerantz/2014/11/19/netflix-and-nbc-back-away-from-bill-cosby/.

[82] *See* Nellie Andreeva, *Bill Cosby Controversy is NBC Conundrum: Will America Accept Him Playing a Family Man Again?*, DEADLINE HOLLYWOOD (Nov. 17, 2014, 8:30 AM), http://deadline.com/2014/11/bill-cosby-controversy-nbc-series-plan-1201285605/. Given that cast members of The Cosby Show were made to sign morality clauses, widely speculated to be the basis of Lisa Bonet's abrupt departure, it is possible that the publicity surrounding Cosby's misdeeds has implications for his prior body of work. *See* Kara Kovalchik, *10 Actors' Dramatic Departures from Popular Shows*, MENTAL FLOSS (Sept. 12, 2011, 5:30 AM), http://mentalfloss.com/article/28735/10-actors-dramatic-departures-popular-shows.

public opinion could prove fatal.[83] For example, although Charlie Sheen's remarks were alarming, the public seemed to revel in the entertainment value of his outlandish public persona.[84] The bigger concern seemed to be Sheen's questionable lifestyle habits affecting his performance, and the producer's general desire to eliminate him from the cast.[85] The *Nader* case involved similar concerns, given the incapacitating nature of Nader's cocaine addiction and the bad press it engendered.[86] On the other hand, the cases of Mel Gibson and Bill Cosby represent different concerns because the morally offensive allegations turned public opinion against them. Cosby has suffered widespread shaming in the media, especially given his towering cultural presence beforehand.[87] To this day, it appears Gibson's career has yet to recover.

2. Newscasters

Morals clauses have also been an issue for television newscasters. These clauses are key for news broadcasters, because newscasters must maintain credibility in order for viewers to trust them. Understandably, the public seems to have less tolerance for the controversial antics of those they trust to relay the news.

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[83] This challenge has also paved the way for the success of streaming platforms like Netflix. Todd Spangler, *TV Ratings Have Hurt Creative Side of Television, Says Netflix Content Boss Sarandos,* VARIETY (Dec. 8, 2014, 12:46 PM), http://variety.com/2014/digital/news/tv-ratings-have-hurt-creative-side-of-television-says-netflix-content-boss-sarandos-1201373908/.

[84] Media sources still revel in the entertainment value of Sheen's "meltdown." *See, e.g.*, Yahr, *supra* note 74.

[85] *See id.* Although, it does not appear his antics were unforgivable; as it was widely Sheen would return for the finale of Two and a Half Men. Lynette Rice, *It's Official: Charlie Sheen Will Have a Presence on the Two and a Half Men Finale – But There's a Catch*, PEOPLE (Feb. 6, 2015, 7:30 AM), http://www.people.com/article/charlie-sheen-two-and-a-half-men-finale.

[86] *See* Katz, *supra* note 10, at 213-14. His argument that he had been fired based on a disability, his cocaine addiction, was rejected by the court. ANDREWS EMP. LITIG. REP. 12, *supra* note 70.

[87] Cosby has lost millions of dollars, had several honorary degrees revoked, and has been accused of tarnishing the Cosby show legacy. *See e.g.*, Daniel Bukszpan, *How Bill Cosby's Fortune and Legacy Collapsed*, FORTUNE (Jul. 15, 2015, 10:18 AM), http://fortune.com/2015/07/15/bill-cosby-fortune-collapse/; Sydney Ember & Colin Moynihan, *Honorary Degrees in Unwanted Spotlight*, N.Y. TIMES, Oct. 7, 2015, at C1, *available at* http://www.nytimes.com/2015/10/07/arts/television/to-revoke-or-not-colleges-that-gave-cosby-honors-face-a-tough-question.html?_r=0; Nancy Dillon & Corky Siemaszko, *Actor Who Played Bill Cosby's Son on 'The Cosby Show' Says Rape Allegations Have 'Tarnished' Show's Legacy,* N.Y. DAILY NEWS (Oct. 10, 2015, 12:06 AM), http://www.nydailynews.com/entertainment/gossip/bill-cosby-questioned-alleged-1974-molestation-article-1.2391569.

Bad publicity that might undermine their credibility can wreak havoc on their popularity and the network's viewership.

For example, Alycia Lane, a popular Philadelphia anchorwoman on a CBS subsidiary, attracted considerable negative public attention when she was arrested and charged with assault in New York City.[88] Lane allegedly hit a female police officer and called her a homophobic slur.[89] Although she pled not guilty and contested the charges, the incident activated the morals clause in her contract, and CBS terminated her employment.[90] Lane's alleged reprehensible statements proved to be the downfall of her career as an anchorwoman.

Another incident involved Virginia Galaviz, a reporter covering the "Crime Beat" for a TV station in San Antonio who was similarly terminated based on a morals clause in her contract.[91] Galaviz was involved in three incidents that garnered negative media attention. She had a confrontation with a city councilman whom she was dating, she had an interaction with another woman whom her boyfriend was dating, and an altercation with her fiancée in which both of them were arrested.[92] Although she challenged her termination and argued that the language of her morals clause was ambiguous, the trial and appeals court both held that her conduct was covered and her termination was justified.[93] Understandably, an arrestee with a violent record is no longer considered a credible crime reporter.

Brian Williams, discussed in the introduction, is the most recent example of a morals clause affecting a newscaster. Williams' contract contained the standard NBC News morals clause:

> If artist commits any act or becomes involved in any situation, or occurrence, which brings artist into public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a

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[88] DiBianca, *supra* note 13.

[89] *Id.*

[90] *Id.*

[91] *Morals Clause Forecloses Claim of San Antonio TV Reporter*, 21 No. 8 TEX. EMP. L. LETTER 2 (2010).

[92] *Id.*

[93] *Galaviz v. Post-Newsweek Stations*, 380 F. App'x 457, 459-60 (5th Cir. 2010); *see also TV Reporter Fired Due to Morals Clause Violation, Not Sex Bias*, EMP. PRAC. GUIDE, 2013 WL 422203 (2009).

> significant portion of the community, or if publicity is given to any such conduct . . . company shall have the right to terminate.[94]

NBC executive Stephen Burke and Comcast CEO Brian Roberts had the ultimate responsibility of determining whether Williams breached his duties under the clause.[95] The fallout surrounding Williams has led to a major loss of credibility for both himself and NBC. His trustworthiness ranking has tumbled,[96] and the network has turned against their former star.[97] NBC lost nearly 700,000 viewers in the wake of the scandal, and it is still unclear if the scandal has permanently damaged the network's image and ratings.[98] Due to Williams' presence as a major news anchor with his own show, it is curious that his contract would contain the same morals clause as all other NBC News employees. Because of this clause, even if producers preapproved his comments and his lies, any resultant public disrepute would still activate the clause. Given his relative youth and success, it will be interesting to see if his reputation can be rehabilitated. His ultimate fate will be telling for the implications of bad press and the loss of credibility for television newscasters.

3. Reality Television Stars

Finally, morals clauses have become a huge issue within the burgeoning reality TV industry. Americans delight in the misbehavior of these stars and live vicariously through their transgressions. Catering to this public demand, while censoring the more outlandish actions and outbursts of talent, has posed a legitimate challenge to TV networks. Networks have been using morals clauses in an attempt to constrain the more controversial reality stars.

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[94] Emily Smith, *Contract 'Morality Clause' Could Determine Brian Williams' Future,* N.Y. POST: PAGE SIX (Feb. 15, 2015, 10:33 PM), http://pagesix.com/2015/02/15/brian-williams-future-hangs-on-morality-clause-in-contract.

[95] *Id.*

[96] Lloyd Grove, *Peacock Panic: NBC Suspends Brian Williams for Six Months*, DAILY BEAST (Feb. 10, 2015, 5:55 AM), http://www.thedailybeast.com/articles/2015/02/10/fear-and-loathing-at-nbc.html.

[97] It is alleged that NBC seriously considered firing Williams before his 6-month unpaid suspension. Aaron Feis, *NBC Considered Firing Brian Williams Before Suspending Him*, N.Y. POST: PAGE SIX (Feb. 12, 2015, 12:04 PM), http://pagesix.com/2015/02/12/nbc-considered-firing-brian-williams-before-suspending-him/.

[98] "The viewer hemorrhage was magnified by the fact it happened in the winter — traditionally the most competitive season for network newscasts." Michael Starr, *'NBC Nightly News' Loses 700K Viewers After Brian Williams Scandal*, N.Y. POST (Feb. 18, 2015, 12:17 PM), http://nypost.com/2015/02/18/nbc-nightly-news-loses-700k-viewers-after-brian-williams-scandal/.

This phenomenon is aptly illustrated by the recent examples of controversies surrounding reality shows "Duck Dynasty" and "Here Comes Honey Boo Boo." Phil Robertson, the patriarch of Duck Dynasty's starring family was suspended by A&E after making anti-gay remarks in GQ magazine.[99] Although specifics of his agreement were not revealed, it was widely speculated that his suspension was based upon a morals clause in his contract with the network.[100] When A&E ended his suspension amidst fan protestation, they "saw ratings plummet nearly 50 percent from the show's heights."[101] Similarly, after revelations that "Here Comes Honey Boo Boo" star "Mama June" Shannon was dating Mark McDaniel, a convicted sex offender who had recently been released from prison after a decade behind bars, TLC cancelled the show.[102] Shannon lost payment for the early termination of the contract based upon the morality clause in her agreement with the network.[103] Because the other cast members did not violate their morals clauses, they still received the full benefit of their contracts.[104]

These examples demonstrate the ever-present risks facing reality TV producers: "handing worldwide platforms to dubious people in questionable circumstances" and hoping those people will not implode until the show's popularity is already in decline.[105] The consistent popularity of reality shows, built upon the misbehavior of their stars, demonstrates that the American public is far less concerned with the good morals of reality stars. However, morality clauses are

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[99] Tim Kennealley, '*Duck Dynasty' Star Phil Robertson: What Are His Legal Options?*, THEWRAP (Dec. 19, 2013, 6:06 PM), http://www.thewrap.com/phil-robertson-duck-dynasty-free-speech-religious-discrimiination/

[100] *Id.*; *see also* Scott Collins, *'Duck Dynasty': A&E Warned Phil Robertson About Speaking Out Too Much*, L.A. TIMES (Dec. 20, 2013, 4:55 PM), http://www.latimes.com/entertainment/tv/showtracker/la-et-st-duck-dynasty-ae-warned-phil-robertson-about-speaking-out-too-much-20131220-story.html ("Phil and other family members also probably signed contracts containing 'morals clauses' in which they promised to, among other things, avoid anything that would embarrass or bring shame to A&E or the brand.").

[101] Eric Deggans, *TLC's 'Honey Boo Boo' Cancellation Shows Dangers Of Exploitative TV*, NAT'L PUB. RADIO (Oct. 24, 2014, 4:08 PM), http://www.npr.org/2014/10/24/358567472/tlcs-honey-boo-boo-cancellation-shows-dangers-of-exploitative-tv.

[102] *Id.*

[103] Ryan Arciero, *'Honey Boo Boo': Mama June Is Losing Salary, New Child Molestation Interview*, EXAMINER (Nov. 1, 2014, 4:26 PM), http://www.examiner.com/article/honey-boo-boo-mama-june-is-losing-payment-child-molestation-safety-risks.

[104] *Id.*; *see also* Karen Butler, *'Mama' June Shannon Won't Be Fully Paid for Final 'Honey Boo Boo' Season*, UNITED PRESS INT'L (Nov. 1, 2014, 2:50 PM), http://www.upi.com/Entertainment_News/TV/2014/11/01/Mama-June-Shannon-wont-be-fully-paid-for-final-Honey-Boo-Boo-season/6121414845458/.

[105] Deggans, *supra* note 101.

essential to protect the network's interests in the event that a talent's antics polarize public sentiment and destroy ratings.[106]

B. Morals Clauses in the Motion Picture Industry

Movie studios also use morals clauses in contracts with talent. While the motion picture industry also faces the branding and advertising concerns of the television industry, these concerns are mitigated because motion pictures developed more independently from advertising than television did.[107] Although movie executives use product placement and co-marketing to "close the gap on budgets,"[108] advertisements are not as essential as they are to television networks. Motion pictures lack dependence on advertisers, but that does not render morals clauses irrelevant. The industry employs morals clauses to protect the value of a film's brand. Studios and their marketing partners have an economic interest in keeping a movie's brand value high, and morals clauses insure that talent does not compromise this value.[109] As brand value increases, actors or actresses that become a liability to maintaining this value are eliminated.[110] The protective value of a morals clause in the motion picture context is therefore largely dependent on the specific parties and projects at issue.[111] Illustrative examples include the high profile cases *Loew's, Inc. v. Cole*,[112] *Twentieth Century-Fox Film Corp. v. Lardner*,[113] and *Scott v. RKO Radio Pictures, Inc.*,[114] discussed in Part I.

Additionally, the movie industry has several noteworthy prohibitions on express morals clauses. Both the Director's Guild of America and the Writer's Guild of America expressly prohibit morals clauses in any agreements signed by guild members as a response to the removal of screen credit for violators.[115] Although the Screen Actors Guild does not have such a blanket prohibition, many contracts between studios and major talent do not contain a morals clause because

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[106] As illustrated by the cases summarized, morals clauses can help minimize damaging fallout for networks. *See, e.g.*, *id.*

[107] Kressler, *supra* note 9, at 243.

[108] *Id.*

[109] *Id.* at 244.

[110] For example, they made the third American Pie movie without troubled and headline prone actress Tara Reid. *See id.*

[111] Katz, *supra* note 10, at 223.

[112] Loew's, Inc. v. Cole, 185 F.2d 641, 658 (9th Cir. 1950).

[113] Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844 (9th Cir. 1954).

[114] Scott v. RKO Radio Pictures, Inc., 240 F.2d 87 (9th Cir. 1957).

[115] Credit is the lifeblood of writers and directors, who do not enjoy the same level of notoriety and recognition as on screen talent. SAG and AFTRA do not include such prohibitions. Katz, *supra* note 10, at 198-99.

these famous actors are influential enough to eliminate this contractual language.[116] As a result, a morals clause is often the first thing stricken from a contract.[117] However, studios may attempt other methods to coerce talent into behaving properly, such as threatening liability for monetary damages to a production or distancing a production from the studio.[118]

Movie studios have concerns similar to those of television networks when it comes to morals of the talents. Due to huge production budgets and the importance of ticket sales, incapacitated talent or bad press can derail the success of a movie. Therefore, studios consider morals clauses important to protecting their bottom line.

C. Morals Clauses in Sports Contracts

Morals clauses have also existed throughout the history of professional sports. Given the "tough guy" image cultivated by many professional athletes, morals clauses have different implications in the context of sports. The harbinger of the modern sports' morals clause was that of Babe Ruth, who had a provision in his contract requiring him to abstain from alcohol and to be in bed by 1:00 am during the baseball season.[119] Although his clause differed from modern morals clauses because violation did not result in termination of his contract, it did allow legal action upon breach, laying the foundation for the modern usage of morals clauses in professional sports.[120]

Morals clauses have become routine in national league contracts. "As of 2008, the collective bargaining agreements in the National Football League,[121]

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[116] For example, "[w]hen Tom Cruise entered the 'danger zone[,] with public tirades about psychiatry, Scientology, and postpartum depression,' Paramount Pictures was still obligated by contract to release Mission: Impossible III," and "when Mel Gibson was arrested for drunk driving in 2006, Disney had no right to terminate its distribution agreement for Gibson's movie *Apocalypto*." Katz, *supra* note 10, at 199-200.

[117] *Id.*

[118] Morgan Creek productions threatened to do as much when Lindsay Lohan misbehaved consistently on the set of Georgia Rule. *Id.* at 200 & n.84.

[119] Porcher L. Taylor III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L. J. 65, 75–76 (2010).

[120] *See id.*

[121] Under § 11 of the NFL Player Contract, a football club may terminate the player contract "[i]f at any time, in the sole judgment of Club, . . . [the] Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club." NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 2006-2012, at 252 (2006), *available at* http://www.docslide.us/documents/nfl-collective-bargaining-agreement-2006-2012.html.

National Basketball Association,[122] National Hockey League,[123] and Major League Baseball[124] each contained a standard player agreement that included a morals clause. "[125] Collective bargaining agreements leave little room for negotiation between individual players and teams on the subject of morals clauses because they are negotiated for the league as a whole.[126]

Morals clauses in athletes' league contracts are employed by teams and leagues in an attempt to moderate the athletes' off-duty behavior. For example, the NFL suspended Adam "Pacman" Jones for the entire 2007 season after being arrested five times in less than two years. "Despite being reinstated by the NFL with clearly delineated requirements for avoiding subsequent suspensions, Jones became involved in an alcohol-related fight with a member of his security team during the 2008 season," resulting in another suspension.[127]

Morals clauses are not always effective in this context. In an effort to circumvent these clauses, the leagues have been lenient in their interpretation of immoral conduct. For example, when Jayson Williams was indicted on manslaughter charges in 2002, his agent argued that the morals clause in his contract did not apply because the clause required intentional moral impropriety, and there was no allegation that his conduct was intentional.[128] Similarly, an NBA

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[122] Under § 16 of the NBA's Uniform Player Contract, a basketball team may terminate a player contract "if the Player shall . . . at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship." NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, at A-16 (2011), *available at* http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_(newversion_reflectsJeremyLinRuling)May30_2013.pdf.

[123] Under the NHL Standard Player's Contract, § 2(e), each NHL player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally." COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYER'S ASSOCIATION, at 245 (2005), *available at* http://www.nhl.com/cba/2005-CBA.pdf.

[124] Under § 7(b) of the Major League Baseball Uniform Player's Contract, a baseball club "may terminate [a player contract] . . . if the Player shall at any time . . . fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship." 2012-2016 BASIC AGREEMENT, at 284 (2011), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. *Id.* at 284.

[125] Pinguelo & Cedrone, *supra* note 8, at 364.

[126] *Id.*

[127] *Id.* at 373.

[128] Tom Canavan, *Williams Will Still Be Paid from Nets Deal, Agent Says: Morals Clause Does Not Apply to Remaining $24 Million*, RECORD (Newark), Feb. 28, 2002, at A04.

Grievance Arbitrator reinstated player Latrell Spreewell's contract with the Golden State Warriors after finding that choking one's coach does not meet the NBA's "moral turpitude" standard.[129] When videos surfaced of Baltimore Ravens running back Ray Rice knocking unconscious his now-wife Janay in an Atlantic City elevator, he was initially suspended indefinitely, but won his appeal and was reinstated.[130] After public sentiment turned against Rice, the Ravens, and the NFL for how they handled the incident, the NFL strengthened its domestic violence policy.[131] As these examples illustrate, although national sports leagues attempt to control their athletes' behavior through morality clauses, they have not been entirely effective.

D. Morals Clauses in Advertising

Morals clauses are prevalent in advertising contracts between brands and spokespeople. Many companies use celebrity spokespeople to distinguish their brands from other similar products.[132] In choosing celebrity endorsers, advertisers emphasize "trustworthiness, values, image, reputation and publicity risk."[133] Studies illustrate that celebrity endorsements affect consumers favorably and commingle the public perception of the celebrity and the product .[134] However, this so called "meaning transference" can be a double-edged sword. When the celebrity offends the public, this negative perception can transfer from the person to the product.[135] "Advertisers worry that once a celebrity's image is connected with a product, it may become an albatross if it is besmirched by allegations of impropriety."[136] Therefore, companies often include morals clauses within endorsement contracts that allow them to protect themselves from these risks by quickly severing ties and disassociating the connection between offensive talent and products.[137]

A typical morals clause in an endorsement contract is similar to a standard express morals clause, but the talent can negotiate for narrower clauses.[138] Courts

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[129] Katz, *supra* note 10, at 208–09.

[130] Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN (Nov. 30, 2014, 12:59 AM), http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/.

[131] Josh Levs, *NFL Toughens Policy Addressing Assault and Domestic Violence*, CNN (Dec. 10, 2014, 10:45 PM), http://www.cnn.com/2014/12/10/us/nfl-conduct/index.html.

[132] Hill, *supra* note 38, at 14.

[133] Kressler, *supra* note 9, at 240–41.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Success will depend on the talent's leverage. Pinguelo & Cedrone, *supra* note 8, at 364.

have held that an express morals clause gives the brand owner a reasonable amount of time to determine the public perception of a clause violation and decide if they want to terminate the endorsement arrangement.[139] Although these clauses provide an exit opportunity for brand owners, endorsement agreements are still risky. Even if the fallout is minimized, there is potential for damage based on existing products featuring the celebrity's likeness, or the previously established association between the celebrity and the brand.[140]

A striking example of the drawbacks of meaning transference is illustrated by the misstep of the "creator of branding," P&G. After choosing spokeswoman Marilyn Briggs, P&G suffered fallout when an adult film she starred in was released the same week as millions of Ivory soap boxes featuring her likeness.[141] Numerous reviews of the film mentioned the association, and "Ivory's association with 'purity,' 'mildness' and 'home-and-hearth values' was fiercely bruised."[142]

Many other similar mishaps have occurred with companies and their spokespeople in recent years.[143] For instance, when pictures surfaced of Kate Moss doing cocaine, retailer H&M and designers Chanel and Burberry dropped her from their advertising campaigns.[144] Less famous spokespeople are not immune from the effects of morals clauses either. Benjamin Curtis, most famous for being the "Dell Dude," was dismissed from his contract with Dell Inc. after being arrested for marijuana possession in 2003.[145]

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[139] Hill, *supra* note 38, at 14–15.

[140] *See id.* at 15.

[141] Kressler, *supra* note 9, at 239.

[142] *Id.*

[143] "Other such deals include . . . Seven-Up with Flip Wilson (later arrested for trafficking cocaine), Mazda with Ben Johnson (later implicated in an Olympic steroid scandal), Gillette with Vanessa Williams (later appearing nude in Penthouse magazine), Beef Industry Council with Cybil Shepherd (later telling a journalist she did not like to eat beef), Pepsi-Cola with Michael Jackson (later canceling his world tour amid charges of child molestation and admitting that he was addicted to painkillers), Pepsi-Cola with Madonna (later releasing her controversial video for "Like a Prayer"), Pepsi-Cola with Britney Spears (later appearing in numerous magazines drinking Diet Coke), O.J. Simpson with Hertz (later arrested for two murders), and National Fluid Milk Processors Board ("Got Milk?") with Mary- Kate and Ashley Olsen (the former later checked into a treatment facility for an eating disorder)." *Id.* at 241 n.43.

[144] *Id.* at 235; *see also* Pinguelo & Cedrone, *supra* note 8, at 347; *Kate Moss: Sorry I Let People Down*, CNN (Sept. 22, 2005, 3:13 PM), http://www.cnn.com/2005/WORLD/europe/09/22/kate.moss/.

[145] Pinguelo & Cedrone, *supra* note 8, at 372; *see also* Anthony Ramirez, *"Desperate Housewives" Actor Arrested on Marijuana Charge,* N.Y. TIMES, May 19, 2005, at B2, *available*

The most prominent morals clause mishaps have been violations of athletes' endorsement contracts. OJ Simpson, who led the way for sports stars to become spokespeople, also illustrated the importance of morals clauses when he was indicted for a double murder while serving as the spokesman for Hertz, among other brands.[146] Since then, these clauses have become more prevalent in sports endorsement contracts. While a 1997 survey found that less than half of all sports endorsement contracts had morals clauses, by 2003 that number had grown to at least seventy-five percent.[147] Commentators suggest that the growing use of morals clauses in endorsement contracts is due to a combination of factors: the significant amounts of money at stake, the increasing youth of athletes and the concerns posed by an athlete's potential volatility.[148]

There are many other examples of athletes falling victim to morals clauses in endorsement contracts. In 1999, former Sacramento King's player Chris Webber successfully challenged the termination of his endorsement agreement with sportswear brand Fila pursuant to the morals clause.[149] Furthermore, after Kobe Bryant was charged with sexual assault in 2003, he lost endorsement deals with McDonald's, Nutella, Spalding, and Coke, altogether totaling $4 million.[150] When

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at http://www.nytimes.com/2005/05/19/nyregion/desperate-housewives-actor-arrested-on-marijuana-charge.html?_r=0.

[146] *See* Bruce Horovitz, *Simpson Ads Opened Door to Endorsements by Athletes Marketing: Sponsors Are Leery of Controversy. Hertz is Expected to at Least Temporarily Suspend Its Use of Ex-Football Star*, L.A. TIMES, June 15, 1994, at 18, *available at* http://articles.latimes.com/1994-06-15/news/mn-4395_1_sports-marketing. Morals clauses in these contracts allowed the brands to sever the relationship, but the damage was already done, specifically in the case of Hertz.

[147] Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 4 (2005).

[148] *See id.*; *see also* Pinguelo & Cedrone, *supra* note 8, at 369 (stating that in the sports industry alone, "as of May 31, 2008, Nike, Inc., owed more than $3.8 billion in endorsement deals" and the "aggregate of sponsorship deals for the 2008 Beijing Olympics was approximately $2.5 billion").

[149] Webber argued that paying an administrative fine did not constitute the conviction necessary to trigger the clause, winning a $2.61 million judgment in arbitration. Pinguelo & Cedrone, *supra* note 8, at 377–78; *see also 'Prematurely Terminated' - Kings' Webber Wins Ruling Against Fila*, CNN/SPORTS ILLUSTRATED (July 8, 1999, 4:07 PM) https://web.archive.org/web/20040503065604/http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/.

[150] In "the greatest marketing comeback in the history of sports marketing," less than six years later, Bryant was re-engaged by Nike and Coke's Vitaminwater, put at number 10 on the Forbes Celebrity 100 list, and his jersey outsold all others in the NBA for the second time in the three years. Bryant's success at making the public and endorsing corporations "forget" his crimes is nothing short of astounding. Taylor, Pinguelo & Cedrone, *supra* note 119, at 101–02; *see also*

Atlanta Falcons quarterback Michael Vick was indicted on dogfighting charges in 2007, Nike, Reebok and Donruss dropped him from endorsement deals.[151] After the adultery scandal that surrounded Tiger Woods in 2009, he lost $22 million in endorsement deals with companies including Gatorade, Accenture, and AT&T.[152]Finally, aided by a broadly-worded morals clause, Nike ended its endorsement deal with seven-time Tour de France winner, Lance Armstrong, in 2012 following mounting allegations that he abused performance enhancing drugs over the course of his career.[153]As all of these examples illustrate, morals clause violations in sports endorsement contracts are widespread.

Because advertisers try to appeal to a wide audience and sell products to the public, they are likely to have lower tolerance for controversies and any bad press about a spokesperson. Any desirable attention that talents' misbehavior might offer to a movie studio or television network is undercut by the risks of meaning transference: a spokesperson's controversial persona becoming irrevocably intertwined with the contracting company's image.

Darren Rovell, *Bryant Is NBA's Most Marketable Again*, CNBC (June 15, 2009, 9:34 AM), http://www.cnbc.com/id/31367376.

[151] Pinguelo & Cedrone, *supra* note 8, at 375. Although Vick suffered a "'catastrophic and very public fall' from sports stardom," and had to "climb a steep hill to repair his tarnished image," he has appeared to have fully recovered. *See* Taylor, Pinguelo & Cedrone, *supra* note 120, at 103. In 2011, nearly four years after they cancelled his contract, Nike signed him to a new deal. *See Nike Re-signs Vick*, N.Y. TIMES, July. 2, 2011, at D3, *available at* http://www.nytimes.com/2011/07/02/sports/football/nike-re-signs-vick.html.

[152] Nike, Woods' biggest endorser since he went pro in 1996, stood by the golfer. Will Wei, *Tiger Woods Lost $22 Million in Endorsements in 2010*, BUSINESS INSIDER (July 21, 2010, 1:19 PM). http://www.businessinsider.com/tiger-woods-lost-22-million-in-2010-endorsements-2010-7. Despite the fallout suffered by Woods in the wake of the scandal, he seems to have recovered, signing his biggest deal since with Hero Motorcorp in December 2014. Bob Harig, *Tiger's New Deal Biggest in Years*, ESPN (Dec. 3, 2014, 6:55 PM), http://abcnews.go.com/Sports/tigers-deal-biggest-years/story?id=27349217.

[153] "The termination of Armstrong as an endorser of the Nike brand was likely simplified by the inclusion of a broadly worded 'morals clause' within the cyclist's endorsement contract with Nike. Morals clauses are typically worded in such a way as to allow a brand to immediately terminate an endorsement contract, without any penalty, should the athlete endorser act in a certain manner that would tarnish the reputation of the brand." Darren Heitner, *Nike's Disassociation from Lance Armstrong Makes Nike a Stronger Brand*, FORBES (Oct. 17, 2012, 10:22 AM), http://www.forbes.com/sites/darrenheitner/2012/10/17/nikes-disassociation-from-lance-armstrong-makes-nike-a-stronger-brand/.

IV
TALENT'S RESPONSE: REVERSE MORALS CLAUSES

Recent developments in the corporate realm have encouraged performers to seek the protection afforded by a morals clause for themselves by using reverse morals clauses. This "reciprocal contractual warranty . . . [is] intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement," and give talent, "the reciprocal right to terminate an endorsement contract based on such defined negative conduct."[154] Such a clause seeks to protect talent from vulnerability they would otherwise have, even if they are aware of the company's misconduct prior to any public scandal.[155] The history and drafting considerations of reverse morals clauses are essential to understanding their function.

A. History of Reverse Morals Clauses

The first example of a reverse morals clause was between Pat Boone and Bill Cosby's record label, Tetragrammaton Records, in 1968.[156] Boone was a religious man with a clean image, and he was concerned about signing a deal with Tetragrammaton due to the provocative cover art featured on the label's new release "Two Virgins," which depicted John Lennon and Yoko Ono nude. Tetragrammaton was "sympathetic to his religious concerns and agreed to a 'reverse morals clause – Boone's contract would lapse if the record company . . . did something unseemly." Ultimately, no formal contract was drawn up.[157] Boone's "novel advocacy of a reverse-morals clause was most likely achievable due to his iconic stature in the entertainment world and his integrity aura in arguably a more conservative era in American history."[158]

Although reverse morals clauses originated with Boone in the 1960s, they have become more relevant due to the financial instability of recent years. The Enron case provides a compelling example of the need for reverse morals clauses in certain cases.[159] In 1999, Enron signed a $100 million, 30-year deal, with the

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[154] Taylor, Pinguelo & Cedrone, *supra* note 119, at 66–67.

[155] Mark Kesten, *Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee,* CORNELL HUM. RESOURCE REVIEW, Nov. 23, 2012, http://www.cornellhrreview.org/reputation-insurance-why-negotiating-for-moral-reciprocity-should-emerge-as-a-much-needed-source-of-protection-for-the-employee/.

[156] Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

[157] *See id.* at 80; *see also* Joseph Reiner, *Pat Boone*, ENCYCLOPEDIA.COM (1995), http://www.encyclopedia.com/topic/Pat_Boone.aspx - 2-1G2:3493100014-full.

[158] Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

[159] *Id.* at 66.

Houston Astros to name the team's new ballpark Enron Field.[160] Two years later, "Enron filed what was then the largest bankruptcy in American history [and] . . . [s]ince then, the word 'Enron' has been embedded in the national psyche and lexicon as being the icon of corporate avarice and the perpetuation of a Ponzi-type scheme on the public."[161] Because many Astros fans had lost their jobs as a result of the Enron scandal, the Astros spent the next two months trying to buy the balance of the contract for over $2 million to remove Enron's name from the stadium.[162] Even though the Astros secured a new naming rights sponsor, Minute Maid, this change caused it further pecuniary damages because naming rights decrease with rebranding.[163]

Although Enron is a landmark example of the need for a reverse morals clause, it was certainly not the last.[164] In 2009, professional golfer Vijay Singh signed a five-year $8 million endorsement deal with Stanford Financial Group, just one month before allegations that Stanford had participated in a large scale Ponzi scheme surfaced.[165] In 2011, Dior terminated its creative director John Galliano after he was videotaped while shouting anti-Semitic slurs, angering the public and Israeli-born Dior spokesmodel Natalie Portman.[166] These examples illustrate the importance of endorsees protecting themselves with reverse morals clauses.

Because reverse morals clauses are a relatively new development, there is little scholarship and no case law regarding their use, and parties who have drafted them have not released them to the public.[167] However, these clauses are increasingly requested by talent in their contracts, and they serve an important

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[160] *Id.* at 68.

[161] *Id.*

[162] *Id.* at 68–69.

[163] *Id.* at 69; *see also* Ric Jensen & Bryan Butler, *Is Sport Becoming Too Commercialised? The Houston Astros Public Relations Crisis*, 9 INT'L J. SPORTS MARKETING & SPONSORSHIP 23, 27, 29-30 (2007).

[164] Additionally, "in less scandalous cases, where companies that bought the rights for the stadia of the Baltimore Ravens (PSI Net), St. Louis Rams (Trans-World Airlines), St. Louis Blues (Savvis), and Carolina Panthers (National Car Rental) went bankrupt or out of business, the teams were compelled to buy back the naming rights, which can be costly, as reflected in the Baltimore Ravens having to pay $5.9 million to the bankrupt PSI Net in 2002." Taylor, Pinguelo & Cedrone, *supra* note 119, at 70.

[165] Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, FORBES (Jan. 2, 2014, 9:24 AM), http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality.

[166] *Id.*

[167] *See* Taylor, Pinguelo & Cedrone, *supra* note 119, at 71.

function in times of financial uncertainty.[168] Given that talent have been subject to traditional morals clauses for so long, it seems appropriate they are afforded mutuality.

V
DRAFTING MORALS CLAUSES

In order to ensure that a morals clause is enforceable and inclusive, it is essential that it is properly drafted. Because of the obstacles posed by the modern and evolving moral climate, phrasing is key in both express and reverse morals clauses.

There are several important elements to an effective morals clause. First, the term of the clause must be stipulated. Some clauses only apply to future conduct, while others apply to past conduct.[169] Second, clauses may include acts that have the mere potential to bring harm to the employer, in addition to acts that cause actual injury.[170] If potential injury language is included, the fact finder must examine the facts objectively and subjectively, and stipulate termination if this future injury can be proved.[171] Third, a clause can protect related parties, as opposed to just the employer.[172] Fourth, employers should consider language that both reserves rights not expressed in the contract, and also does not give talent a right to cure.[173] Fifth, the scope of the language of the clause is essential; employers prefer expansive language, while talent prefers narrow language, creating a potential sticking point in contract negotiations.[174] Finally, and most importantly, ambiguity must be minimized to the greatest extent possible.[175]

Even given proper care in drafting, clauses vary widely in breadth. The major issue is the type of transgression covered by the clause. While some clauses protect against only crimes, felonies, or convictions, others are comprehensive enough to encompass any conduct breeding adverse moral sentiment. Charlie Sheen's weak "moral turpitude" clause is an example of the former and the strong

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[168] "Citigroup, the largest government bailout recipient in November 2008, precipitated a scandal of sorts, when it announced that it would charge ahead with the costliest naming-rights deal in sports history with the New York Mets, even though the financial giant had just laid off 52,000 employees and was treading water with almost $20 billion in losses for 2008." *Id.* at 89.

[169] Kressler, *supra* note 9, at 254.

[170] *Id.* at 255.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 255–56.

[175] Katz, *supra* note 10, at 212.

clause in Williams' contract represents the latter. Some agreements are so broad that even alleged violations that turn out to be false,[176] or conduct that "may be considered" a violation, can trigger the clause.[177] If a person has done something in the past that might fall into the categories of conduct included in the clause, the morals clause can be triggered if the past conduct is publicized during the contract term.[178] Remedies can also vary, and can include termination of the agreement and/or the right to remove or withhold credit.[179] Therefore, based on variations in drafting, clauses can differ greatly in their force.

The drafting process for reverse morals clauses differs slightly from that of express morals clauses. As an initial matter, talent must determine the necessity of a reverse morals clause by searching the corporate history of the contracting company. [180] However, not all talent has the leverage to bargain for inclusion of a reverse morals clause, and companies may resist the imposition of moral reciprocity.[181] In addition, drafting concerns are reversed: talent will want a broadly-phrased reverse morals clause, while the employer will desire a narrowly-phrased clause.[182] Finally, talent is concerned with limiting who can invoke the clause and stipulating which corporate entities are bound by it.[183] This will prevent contracting companies from purposely engaging in the proscribed conduct to activate the clause or escaping unscathed when entities violate the agreement.

VI
IMPLICATIONS FOR MORALS CLAUSES IN CONTEMPORARY SOCIETY

The rise of the Internet and development of social media has made morals clauses more important in today's society. "Due to the proliferation of new forms of media, which has greatly increased the speed with which information is disseminated to the public, talented individuals are now significantly more

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[176] Nicolas Cage was accused of being arrested twice for drunk driving and stealing a dog, allegations that turned out to be false, but that could have triggered a morals clause. Pinguelo & Cedrone, *supra* note 8, at 353; *see also* Fox News, *Kathleen Turner Apologizes to Nicolas Cage Over Dog Theft Allegation*, FOX NEWS (Apr. 4, 2008), http://www.foxnews.com/story/2008/04/04/kathleen-turner-apologizes-to-nicolas-cage-over-dog-theft-allegation.html.

[177] SELZ ET AL., *supra* note 26, at § 9:107.

[178] *Id.*

[179] *Id.*

[180] Taylor, Pinguelo, & Cedrone, *supra* note 119, at 92.

[181] *Id.* at 99, 105.

[182] *Id.* at 105.

[183] *Id.* at 105-06.

scrutinized than they have been in the past."[184] An examination of the current moral climate and social media restrictions demonstrate this phenomenon.

A. The State of Morals Today

What constitutes "morality" can be hard to define. "The concept of moral behavior, insofar as it relates to the law, is constantly in a state of flux as it reacts to changes in community standards and incorporating natural evolutionary advancements associated with the growth and development of a society."[185]

American culture has become significantly less concerned with morality. Not only has talent gotten away with misbehavior in the court of public opinion, but contracting companies have also expressed less concern about the moral missteps of talent. Employer leniency can be attributed to the recognition that in the current moral climate, nearly any publicity is good publicity.[186] Christian Slater, Robert Downey Jr., and Charlie Sheen are just a few stars whose misconduct has been tolerated by the industry.[187] Robert Downey Jr. exacted a stunning recovery, going from felon and drug addict to star of one of Hollywood's most lucrative franchises, Ironman.[188]

Different industries have diverse views on morality, which accounts for the discrepancies in morals clause enforcement. Although a newscaster's reputation hinges upon his or her intellectual credibility, a rap artist's depends only on his street credibility, or "street cred."[189] While the former entails avoiding damaging public actions and statements, the latter demands the precise opposite. In the sports and radio industries, morality of the individual athletes and on-air talent seems less of a concern. In radio, provocative statements can be the key to success. Howard

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[184] Pinguelo & Cedrone, *supra* note 8, at 367.

[185] *Id.* at 352; *see generally* Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784 (1989) (examining the circumstances that have contributed to attitudes regarding the relationship between law and morality); Robert P. Burns, *On the Foundations and Nature of Morality*, 31 HARV. J. L. & PUB. POL'Y 7 (2008) (discussing historical observations and arguments relevant to contemporary moral debates).

[186] SELZ ET AL., *supra* note 26, at § 9:107.

[187] *See id.* Each of the stars has had highly-publicized brushes with the law involving drugs and violence. *See, e.g., Actor Christian Slater Gets Jail for Drunk Driving*, L.A. TIMES, Apr. 3, 1990, at B2; *Charlie Sheen Hospitalized in Fair Condition After Overdose*, L.A. TIMES, May 22, 1998, at B4; *Drug Charges Filed Against Robert Downey Jr.*, L.A. TIMES, July 17, 1996, at B4.

[188] Lacey Rose, *Will Charlie Sheen Ever Work Again?*, HOLLYWOOD REPORTER (Feb. 28, 2011, 6:38 PM), http://www.hollywoodreporter.com/news/will-charlie-sheen-ever-work-162554.

[189] *See* RONN TOROSSIAN & KAREN KELLY, FOR IMMEDIATE RELEASE: SHAPE MINDS, BUILD BRANDS, AND DELIVER RESULTS WITH GAME-CHANGING PUBLIC RELATIONS 219 (2011).

Stern made a career out of his outlandish radio behavior, until the FCC imposed formidable fines on the "shock jock," and Stern announced he would leave traditional radio for Sirius Satellite Radio, a medium free of FCC regulation.[190] In sports, being violent is occasionally part of the job description, but athletes struggle to sequester this behavior to the playing field. Players' violent off-field antics have resulted in public criticism of the NFL in recent years. Because each industry has unique concerns, each has a different conception of morality.

Despite the diverse views on morality across industries, public opinion has placed more emphasis on comments than actions. Comments that are homophobic, racist, anti-Semitic, or sympathetic to terrorism have elicited substantial public backlash. For instance, after admitting past use of racial slurs in a deposition, The Food Network dropped celebrity chef Paula Deen and a slew of sponsors.[191] Deen's image has yet to recover from the incident, and she has recently incited controversy again for a racist social media post.[192] Meanwhile, offensive public actions seem to have far less impact. Lindsay Lohan, notorious for her drug use, car accidents, and arrests for driving under the influence, cashed in on her controversial image by advertising car insurance during the Superbowl.[193] Similarly, the public has been largely ambivalent toward Florida State Quarterback Jameis Winston, despite public rape allegations against him. In fact, most of the news surrounding the NFL hopeful centers upon the "risk" of drafting him, rather than disapproval of his actions.[194]

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[190] Sheila Marikar, *Howard Stern's Five Most Outrageous Offenses*, ABC NEWS (May 14, 2012), http://www.abcnews.go.com/Entertainment/howard-sterns-outrageous-offenses/story?id=16327309.

[191] "The Food Network, owned by Scripps Networks Interactive (SNI), let Deen's contract run out, and she was dumped by a slew of sponsors and business partners, including pork producer Smithfield Foods, the casino chain Caesars (CZR), the diabetes drugmaker Novo Nordisk (NVO) and retailers Wal-Mart (WMT), Target (TGT), Home Depot (HD), Sears (SHLD) and JCPenney (JCP)." Aaron Smith, *Paula Deen's Coming Back,* CNN MONEY (Feb. 12, 2014, 3:13PM) http://money.cnn.com/2014/02/12/news/companies/paula-deen-najafi/.

[192] Deen posted a photo of her son in brownface. She later blamed her "Social Media Manager" who was fired after the incident. Emanuella Grinberg, *Paula Deen Under Fire for Photo of Son in Brownface*, CNN (July 7, 2015, 4:05 PM), http://www.cnn.com/2015/07/07/living/paula-deen-brownface-feat/.

[193] *Lindsay Lohan -- I'm the Queen of Car Crashes ... So I'm Selling Insurance!*, TMZ (Jan. 18, 2015, 12:55 AM), http://www.tmz.com/2015/01/18/lindsay-lohan-esurance-commercial/ -ixzz3QnNcOAQd.

[194] *E.g.*, Bill Pennington, *The Tricky Calculus of Picking Jameis Winston*, NY TIMES, Jan. 30, 2015, at D1, available at http://www.nytimes.com/2015/01/31/sports/football/no-1-debate-in-tampa-whether-to-draft-jameis-winston.html?_r=0.

B. Morals Clauses and Social Media

There are a growing number of contractual provisions aimed at promoting confidentiality and prohibiting disparaging remarks on social media platforms, which might fall within the purview of a morals clause. "The virtually instantaneous exposure and, in some cases, embarrassment that can accompany a celebrity's missteps thanks to social networking tools is yet another reason to address and manage that individual's activity through a contractual provision."[195]

Due to this trend, social media restrictions will likely be an increasing presence in morals clauses.[196] For example, ABC guidelines encourage "tweeting", but list seven specific prohibited practices surrounding this activity, including "making disparaging remarks about the show."[197] These restrictions and guidelines are not intended to ban social media, but instead to make talent more mindful of their expression and statements on these platforms.[198] The proliferation of such clauses, and the important role they play in a technologically advancing society has led an industry expert to say, "[e]very celebrity endorsement contract of any kind in the future must have a Twitter/Social Media clause . . . I will be so bold as to state that the failure to not have such a clause would be tantamount to endorsement contract drafting malpractice."[199]

The relationship between morals clauses and social media is complex.[200] First of all, "[e]mployer restrictions on off-duty speech and conduct are troubling in that they squelch expression and individual autonomy and may compromise the employee's right to a private life, especially when restrictions are unilaterally imposed after employment commences."[201] Although there has not been an obvious backlash against these restrictions yet, this is likely due to their novelty. Furthermore, clauses limiting social media expression are in direct tension with

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[195] John G. Browning, *The Tweet Smell of Success: Social Media Clauses in Sports & Entertainment Contracts,* 22 TEX. ENT. AND SPORTS LAW J. 5, 6 (2013).

[196] See Taylor, Pinguelo & Cedrone, *supra* note 119, at 111.

[197] Andrew Wallenstein & Matthew Belloni, *Hey, Showbiz Folks: Check Your Contract Before Your Next Tweet,* HOLLYWOOD REPORTER (Oct. 15, 2009, 1:19 PM), http://www.reporter.blogs.com/thresq/2009/10/check-your-contract-before-your-next-tweet.html.

[198] *Id.*

[199] Browning, *supra* note 195, at 20–21.

[200] Katz, *supra* note 10, at 226.

[201] Patricia Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L. J. 63, 90 (2012) ("Some organizations have restricted their employees' off-duty use of social networking sites or have prohibited using them altogether. For example, the National Football League has prohibited players' access to social media immediately before, during, and after football games.").

another studio practice, leveraging the social media popularity of talent to promote a project.[202] In fact, social media postings have replaced traditional advertising in some talent contract negotiations.[203]

Ensuring that the parties specify what mediums of communication are covered is essential to promoting the proper operation of morals clauses without unfairly trammeling talents' freedom of expression.[204] As social media becomes more prominent and varied in today's society, platforms such as Facebook, Twitter, and Instagram have significantly expanded the scope of what parties must address in talent contracts. Celebrities use these mediums to express themselves, and it is unlikely that they would respond favorably to contractual social media censorship. However, these platforms offer increased, direct contact between celebrities and the public, and create more opportunities for talent to get into trouble.

An offensive post on Instagram takes only moments to complete but could take years to live down. James Franco learned this the hard way when he faced public embarrassment after trying to seduce an underage girl on Instagram.[205] This contrasts starkly with times past, when contact talent had with the public was limited to pre-scripted television and radio appearances or transient personal encounters. Restrictions seem necessary given the dangers these platforms engender; a misstep on any one of them could mean the instantaneous destruction of an entire project, employment relationship, or public persona if the conduct rouses the public enough.

1. Case Study: Twitter

Twitter provides a useful case study of the risks of social media usage and the value of such restrictive clauses. Twitter has become a popular way for celebrities to communicate with fans, but the instantaneous nature of the site begets

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[202] For example, Rihanna was cast in "Battleship" partially because of the exposure she offered through her extensive fan base on social media, including 26 million twitter followers. Browning, *supra* note 195, at 21; *see also* Wallenstein & Belloni, *supra* note 197.

[203] Peter Hess, the co-head of commercial endorsements for Creative Artists Agency said, "We're starting to have in negotiations, 'We'd like to include X number of tweets or Facebook postings.' It's similar to traditional advertising – instead of two commercials, now we want two tweets." Browning, *supra* note 195, at 21.

[204] *See* Katz, *supra* note 13, at 225.

[205] Jay Hathaway, *James Franco Apparently Tried to Hook Up with a Teenager on Instagram*, GAWKER (Apr. 3, 2014, 9:29 AM), http://gawker.com/james-franco-tried-to-hook-up-with-a-17-year-old-on-ins-1557491436.

significant risks of misuse and reputational damage.[206] "Armed with Twitter, talent are just possibly one tweet away from scandal or a morals clause violation."[207]

There are numerous examples of the destructive effects of Twitter use, specifically with regard to its potential to terminate talents' endorsement deals. For example, after the voice of the AFLAC duck, Gilbert Gottfried, tweeted insensitive jokes about a tsunami in Japan, the insurance company terminated his contract.[208] Olympic swimmer Stephanie Rice was dropped from her endorsement deal with Jaguar after she tweeted a homophobic comment.[209] Hanesbrands terminated Rashard Mendenhall, Steelers running back and Champion brands spokesman, for violating his morals clause after he tweeted controversial commentary relating to 9/11.[210] Mendenhall brought a $1 million suit against Hanesbrands for breach of the implied covenant of good faith and fair dealing.[211] "Mendenhall's attorneys began building what will henceforth be known here as the 'Charlie Sheen defense': pointing to another celebrity who has said outrageous things and putting the onus on the other party to explain why one endorsement deal was terminated and another wasn't."[212] Although the suit survived a motion to dismiss, the parties eventually settled.[213] Thus, Twitter presents a compelling example of the destructive effects of social media upon morals clauses.

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[206] Courtney Love, Alice Hoffman, Mark Cuban, and Michael Beasley are among the many celebrities who have experienced backlash from comments made on the social media site. Taylor, Pinguelo & Cedrone, *supra* note 119, at 109–10.

[207] *Id.* at 110–11.

[208] Browning, *supra* note 195, at 20.

[209] *Id.*

[210] Mendenhall tweeted about Osama Bin Laden, "[w]hat kind of person celebrates death? It's amazing how people can HATE a man they never even heard speak. We've only heard one side . . . " And of the 9/11 attacks, the player tweeted, "[w]e'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style." Browning, *supra* note 195, at 20. Hanesbrands claimed that these tweets fell within the purview of the morals clause within Mendenhall's endorsement agreement, because they "concluded that his actions meet the standards set forth in the Agreement of bringing Mr. Mendenhall 'into public disrepute, contempt scandal or ridicule, or tending to shock, insult or offend a majority of the consuming public or any protected class or group thereof . . . .'" Because of these actions, he was considered no longer an effective spokesperson for Champion. Katz, *supra* note 10, at 227.

[211] *Id.*; *see also Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D. N.C. 2012).

[212] Eriq Gardner, *Settlement Reached in Lawsuit Filed by NFL Star Fired as Pitchman for 9/11 Conspiracy Tweets*, HOLLYWOOD REPORTER (Jan. 15, 2013, 3:20 PM), http://www.hollywoodreporter.com/thr-esq/settlement-reached-lawsuit-filed-by-412750.

[213] *Id.*; Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013, 12:02 PM), http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/.

CONCLUSION

You breathe a sigh of relief. Fred Fabricate has been released from his contract based on his morals clause violation. Unfortunately, your enthusiasm is short lived; Fabricate's replacement is not as popular, and the network experiences marked drops in ratings. Were you too hasty in your decision to invoke the morals clause? Is this decline in popularity due to the bad press from the incident, or does America just want their favorite anchor back? You have minimized your financial liability, but at what expense? Will Fabricate's image ever recover, and if so, will you lose out on the profit?

This hypothetical presents many of the same concerns surrounding morals clauses today. Companies use the clauses to temper the link between themselves and talent, controlling their unpredictable behavior and protecting themselves from their potential missteps. Nonetheless, it is often unclear when these clauses have been triggered, when they should be invoked, and the potential repercussions that may occur.

Diverse conceptions of morality and opposition to inhibiting freedom of expression present distinct obstacles to morals clauses today. Although morals clauses have played an important role in motion picture, television, athletics, and advertising contracts for over a century, it is unclear what effect they will have in the future.

On the one hand, morals clauses may lose their relevance entirely due to the increasingly lax moral climate. Under this view, morals matter far less, and there is no sense in attempting to censor them. An initial criticism of this argument is that although cosmopolitan regions of the country have relaxed views on morality, there are still many sectors of the population with a strong religious consciousness and correspondingly rigorous conception of moral conduct. Because these individuals also form a captive audience for the industries in question, their attitudes must also be considered by both courts and employers in enforcing morals clauses. The deeply imbedded cultural opposition to stigmatized concepts of racism, homophobia, anti-Semitism, terrorism and violence also contradict this trend.

In the alternative, morals clauses may only become more important as social media and the speed with which information is disseminated increases public awareness of and contact with talent. The consistent scandal surrounding celebrity expression on social media and the upswing of contractual clauses addressing these issues evidences this inclination.

Despite the merits of the argument that the morals clause is in decline, the clauses remain relevant, effectual, nuanced, and flexible. Even in the case of Brian Williams, a context in which a morals clause is not the most obvious recourse, the provision has demonstrated its pervasive power. Given the proliferation of social media and the backlash of talent through reverse morals clauses, this dynamic area of contract law shows no sign of fading into obscurity.

#MeToo Hits Movie Deals: Studios Race to Add 'Morality Clauses' to Contracts

6:50 AM PST 2/7/2018 by Tatiana Siegel

Illustration by: Zohar Lazar

Sex abuse insurance? It could happen. Broad language allowing stars and distributors to be dropped if accused of misconduct is beginning to be included in negotiations in the wake of the Harvey Weinstein and Kevin Spacey situations.

Moral turpitude? It's a concept that showbiz talent soon will be well-acquainted with. The term, which means "an act or behavior that gravely violates the sentiment or accepted standard of the community," is popping up in contracts of actors and filmmakers in the wake of the #MeToo movement that has rocked Hollywood.

Fox is just one of the studios that is trying to insert broad morality clauses into its talent deals, giving it the ability to terminate any contract "if the talent engages in conduct that results in adverse publicity or notoriety or risks bringing the talent into public disrepute, contempt, scandal or ridicule."

A Paramount source says it long has had standards of conduct that it asks employees and talent to adhere to and that it's reviewing its approach in the new era. At the same time, several smaller distributors have begun to add a clause in their longform contracts that gives them an out if a key individual in a film — whether during or before the term of the contract — committed or is charged with an act considered under state or federal laws to be a felony or crime of moral turpitude.

Studios and buyers are responding to the real financial losses incurred in the aftermath of a flurry of sexual harassment and assault accusations and admissions that have enveloped everyone from Kevin Spacey to Brett Ratner to Jeremy Piven since October, when Harvey Weinstein first was outed as a predator.

Netflix took a $39 million write-down following numerous assault accusations involving *House of Cards*' Spacey, who also was poised to play Gore Vidal in a movie for the streamer. CFO David Wells didn't name Spacey or *The Ranch* star Danny Masterson, who left the Netflix series following rape accusations, but said the write-down was "related to the societal reset around sexual harassment."

Similarly, *All the Money in the World* financier Imperative Entertainment had to pony up $10 million to replace Spacey with Christopher Plummer for eleventh-hour reshoots on the Sony film. Spacey did not have a morality clause in his contracts, according to sources, and was paid for the entire final season of *House of Cards* — even though he won't appear in any of the episodes — and for *All the Money in the World*.

Lawyer Schuyler Moore has begun to add a morality clause to contracts in an effort to protect his distributor clients from being saddled with the next #MeToo-tainted film. "Any distributor can say, 'I'm not picking up this film if somebody involved in the film has some charge like that.' Absolutely. I'm doing it, and [these clauses] are enforceable," says the Greenberg Glusker partner. "And it's just a question of drafting it in a way that works."

As such, there's a new version of liability affecting Hollywood, and studios and buyers are scrambling to figure out how to handle it. Naturally, talent reps are balking.

"I'm all for [#MeToo]. I totally support it. But I think [broad morality clauses] create a bad precedent," says attorney Linda Lichter. "It's one thing to say someone is a criminal. It's another thing to say someone has been accused by someone and you can fire them and not pay them."

Others claim studios and buyers are hypocritical if they are unwilling to include a morality clause covering their own executives. Directors and talent endure economic hardship when their films are bought by a company whose top execs, like Weinstein, become synonymous with sexual ignominy. Adds a top agent: “It’s too far reaching legally. And it should cut both ways as buyers have culpability as well.”

But distributors, all of whom declined to be named for competitive reasons, say their hands are being forced by their ancillary partners including cable providers and pay-TV networks who now are including morality clauses in their long-form contracts.

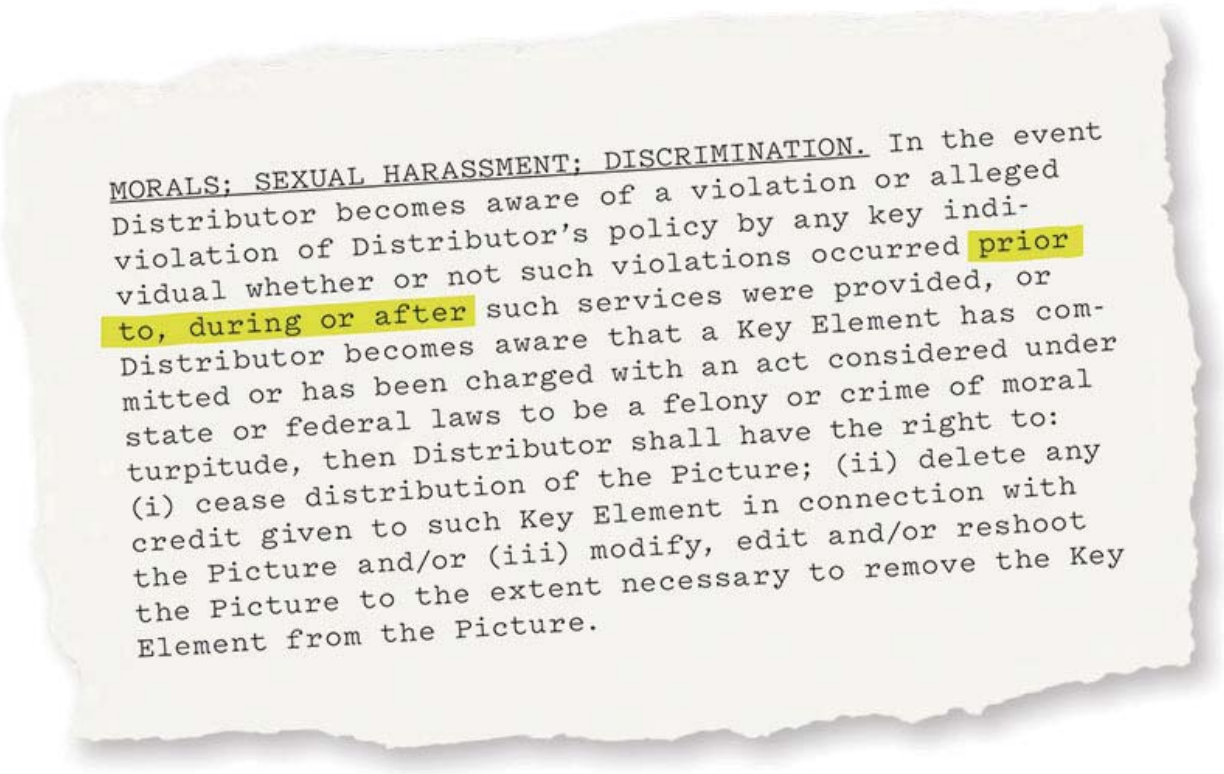
On the flip side, Fox Searchlight lost millions on the release of *The Birth of a Nation* after revelations that star-filmmaker Nate Parker had stood trial for rape when he was a college student (Parker was acquitted) and that his accuser later took her own life.

In the post-Weinstein landscape, a number of distributors have been left in vulnerable positions. YouTube Red dropped Morgan Spurlock's *Super Size Me 2: Holy Chicken!* following the filmmaker's admission of sexual misconduct, but not before paying $3.5 million that sources say it likely won't get back. The Orchard dodged a bullet when its $5 million acquisition of Louis C.K.'s *I Love You, Daddy* became unreleasable after a wave of harassment accusations were leveled at the comedian. Though C.K. was not legally obliged to take back the film, he wrote The Orchard a check to reimburse the company for what it had paid toward the film's release.

"Everyone is trying to cover their asses as much as possible," says one distribution exec whose company recently began adding morality clauses to its contracts.

One producer insists that restrictive clauses will spark an inability to finance movies. "If there is anything downstream that impedes the ability of a financier to recoup his investment, the financier will not invest," says this producer, adding that bond companies do not currently address the potential of a key figure negatively impacting a film because of a sex scandal. Film Finances Inc., the top bond completion company working in Hollywood, declined to comment.

"There's definitely an opportunity for a company to come up with some sort of sex abuse insurance," says the producer. That's a point echoed by Lichter. "The studios should start thinking about whether there's some kind of insurance for this type of thing," she says. "This is a whole new territory."



MORALS; SEXUAL HARASSMENT; DISCRIMINATION. In the event Distributor becomes aware of a violation or alleged violation of Distributor's policy by any key individual whether or not such violations occurred prior to, during or after such services were provided, or Distributor becomes aware that a Key Element has committed or has been charged with an act considered under state or federal laws to be a felony or crime of moral turpitude, then Distributor shall have the right to: (i) cease distribution of the Picture; (ii) delete any credit given to such Key Element in connection with the Picture and/or (iii) modify, edit and/or reshoot the Picture to the extent necessary to remove the Key Element from the Picture.

One film distributor began adding this “morality clause” language to its talent contracts as of the new year.

Lacey Rose contributed to this report.

A version of this story first appeared in the Feb. 7 issue of The Hollywood Reporter magazine. To receive the magazine, click here to subscribe.

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REEL CHICAGO

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Evolving talent agreements after Weinstein and #MeToo

By Jed Enlow Apr 12, 2018

Morals clauses allow termination for scandalous or unsavory actions, including "Moral Terpitude."

If your cookware company was about to release a print campaign with Mario Batali's face plastered all over it, the day after he issued his infamous cinnamon roll apology for sexual misconduct, there could be a big problem.

Companies may have substantial funds and resources invested in projects or campaigns that must be shelved and/or replaced.

Harvey Weinstein, Matt Lauer, Garrison Keillor, Mario Batali, Charlie Rose, Russell Simmons, Kevin Spacey. Unfortunately this is only a fraction of a list of celebrities who recently seemed to be on top of their respective worlds until allegations sent their likeability and brand values in to a nosedive.

I'm not here to discuss the merits and details of these instances, and certainly don't intend to reduce the impact to victims of horrendous actions into a marketing discussion. However, at the end of the day there are business consequences to media creators, brands, and advertisers when talent or endorsers go through an incident that destroys their market value in an instant.

Talent and endorsement agreements commonly account for damaging allegations (and worse) with language known as "morals clauses." These clauses allow termination of agreements with talent for scandalous or unsavory actions, including those of "Moral Terpitude," which is defined as "an act or behavior that gravely violates the sentiment or accepted standard of the community." Often these clauses are very broad, and allow discretion for the producer to decide when actions are offensive enough to warrant termination under a morals clause.

Jed Enlow

Below is a typical morals clause:

> If Artist does anything that is or will be an offense involving moral turpitude under federal, state or local laws or which may bring Company or Artist into public disrepute, contempt, scandal, or ridicule, or which insults or offends the community or any substantial organized group thereof, then Company will have the right at its option to terminate this Agreement by written notice to Artist.

Kevin Spacey was famously replaced in All The Money In The World after his indiscretions came to light. It's hard to fathom how many marketing campaigns had to be scrapped or overhauled in the past several months of fallout from the Harvey Weinstein allegations and resulting #Metoo movement. While morals clauses provide some protection in allowing companies to terminate talent without further payment, companies may need to get more creative to recover costs from lost content. Some may

try to find a way to hold offenders liable for lost costs through indemnity obligations or consequential damages.

On the other hand, some companies end up with a positive PR and marketing result from the goodwill associated with terminating talent agreements in response to bad behavior. All The Money In The World surely got increased press coverage because of the reshoots to replace Kevin Spacey with Christopher Plummer, and the additional controversy over fee differences for Mark Wahlberg and Michelle Williams. I'm sure the film's marketing people weren't devastated by the unexpected bonus press coverage leading up to awards season, and in a sense this might have mitigated the losses from re-shoots and rebranding.

At times, brands go to great lengths to demonstrate their commitment to causes by terminating partnerships, programs, and talent relationships. In recent weeks, Dick's Sporting Goods stopped selling assault style weapons, and many companies have terminated relationships with the NRA in the wake of public backlash to school shootings. Nike in the past terminated an endorsement deal with Manny Pacquiao for homophobic remarks, and it is not uncommon to see lists of advertisers who drop their ad-buys for programs that are known to have a political slant in one direction. While the primary motivator for these decisions is probably the morals and beliefs of company leaders, there is surely consideration given to the market benefit of consumer reactions and press coverage.

In the age of social media, many celebrities seem more outspoken about social issues, in part because their opinions are easily distributed to the world. Entertainers, athletes and other public personalities no longer need the press to spread their messages, and their voices can become hugely influential. It was recently reported that a tweet from Kylie Jenner was responsible for a $1.3 Billion loss in value to Snapchat.

Personal brands are the basis for many celebrity careers, and they need protection as well. It might be wise for some celebrities to negotiate for reverse morals clauses. A reverse morals clause would allow talent to terminate an agreement if the producer or Company engages in activity that is damaging to the reputation of the talent. For example, if Beats Audio suddenly came out against any kneeling during the national anthem, how could Colin Kaepernick continue to endorse their products? If Ashley Judd signed a multi-picture deal and then discovered that the studio head was accused of harassment and assault, should she be able to terminate the deal without penalty? Many celebrities build their brands based on political and policy positions, and the impact if a

partner came out against or contrary to their position could do more damage to their following than the compensation in the agreements.

The wave of change to talent agreements, will likely include discussions about “inclusion riders,” brought to light in Frances McDormand’s Best Actress speech at the Oscars. Inclusion Riders presumably would require producers to include a certain number or percentage of women or minorities in their projects. It remains to be seen how successful talent will be in negotiating for, or more importantly enforcing these riders. Parties on both sides of talent transactions might also consider expanding their definitions in morals clauses to include certain political activity as well, in this political climate of inflamed rhetoric and political boycotts. It is clear that the entertainment industry is feeling the impact of recent sexual assault and harassment revelations, and talent agreements will likely see an overhaul as a consequence. Critics may argue that the first amendment protects the rights of all companies and individuals to voice their opinions, but that has no bearing on the terms of their talent contracts.

Jed Enlow is a Chicago-based entertainment attorney who helps clients navigate the evolving issue of content creation and ownership, finding practical solutions to their content issues. A former partner at Leavens, Strand & Glover, his current clients include the *Pickler & Ben* show, where he is production attorney, and his previous experience includes work for *Steve Harvey* and *The Oprah Winfrey Show*.

BACKTALK

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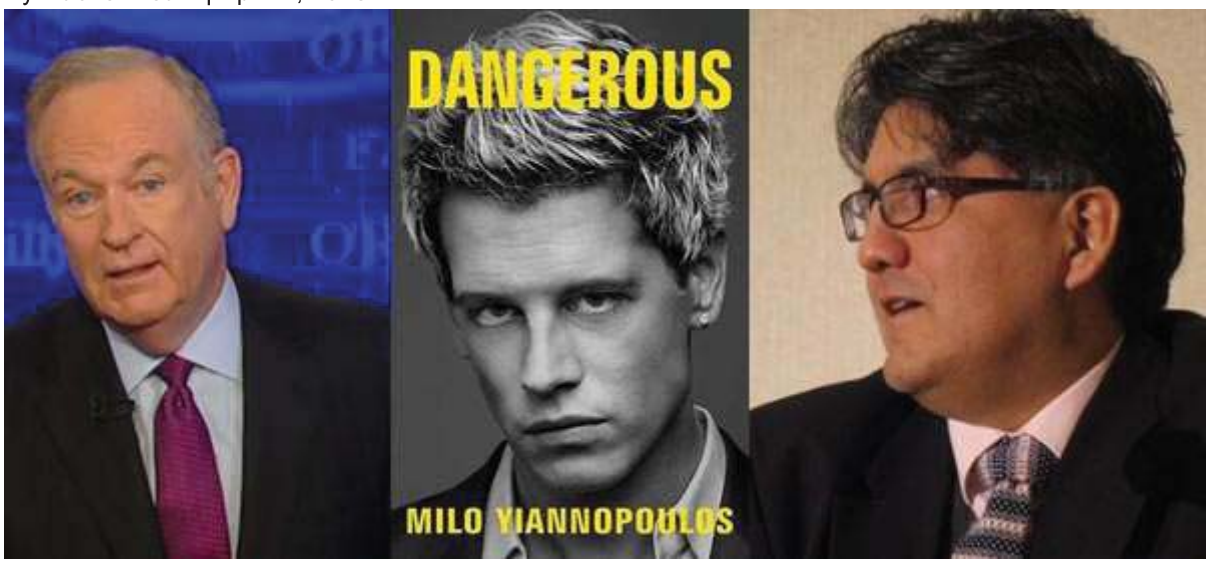
In the #MeToo Moment, Publishers Turn to Morality Clauses

Once an anomaly in author contracts, morality clauses are becoming a standard tool for publishers looking to protect themselves against misbehaving authors

By Rachel Deahl | Apr 27, 2018



Until recently, the term "moral turpitude" is not one that crossed the lips of too many people in book publishing. But Bill O'Reilly, Milo Yiannopoulos, Sherman Alexie, Jay Asher, and James Dashner changed all that.

A legal term that refers to behavior generally considered unacceptable in a given community, moral turpitude is something publishers rarely worried themselves about. No longer.

Major publishers are increasingly inserting language into their contracts—referred to as morality clauses—that allows them to terminate agreements in response to a broad range of behavior by authors. And agents, most of whom spoke with *PW* on the condition of anonymity, say the change is worrying in an industry built on a commitment to defending free speech.

"This is very much a direct response to #MeToo," said one agent when asked about publishers' growing insistence on morality clauses. Most sources interviewed for this article agreed with this sentiment, citing the way sexual misconduct allegations and revelations are ending careers and changing the way companies do business. But it's not just sexual harassment charges (which embroiled bestselling authors O'Reilly, Alexie, Asher, and Dashner) that publishers are scrambling to protect themselves against. It's also the fallout that can come from things their authors say.

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The situation with Yiannopoulos highlights this. S&S's purchase of his book *Dangerous* in December 2016 caused a backlash in certain circles of the industry, with some complaining that the right-wing provocateur peddled in hate speech and should not be given a platform by a major publisher.

In February 2017, after the deal received bad press and several of S&S's authors threatened to leave it, the publisher canceled Yiannopoulos's book. The cancelation coincided with the resurfacing of an old interview Yiannopoulos gave, in which he appeared to condone child abuse.

S&S said that it canceled *Dangerous* because the manuscript was not to its liking. (The language in most author contracts gives publishers quite a bit of latitude in determining what constitutes a suitable manuscript.) Some felt, however, that the publisher was looking for a reason to drop the "alt-right" bad boy. Yiannopoulos sued S&S but wound up dropping the case earlier this year.

The controversy surrounding *Dangerous* highlights the stakes for publishers at a moment when platforms and reputations can be built, or destroyed, with a tweet. For agents, the Yiannopoulos case underlines some of the biggest concerns about morality clauses: the threat of muzzling speech.

"The gist of it," one agent said in reference to a clause in Penguin Random House's boilerplate, "is that [the publisher] wants the right to cancel an author's book anytime the author says or does something the publisher doesn't agree with. It's crazy."

Another agent, who admitted to having concerns about some of the morality clauses he's seen, said he nonetheless understands publishers' rationale for using them. "There are obviously a lot of very complex things going on here," he said, speaking to the way publishers are reacting to the shifting social climate. He also noted that most publishers he's dealt with have been open to changing these clauses. "When you go back to [publishers] and remind them that authors are allowed protected speech, political or otherwise, my experience is that they've been very responsive."

But the agent who called these clauses "crazy" said he felt that more nefarious possibilities lie ahead. "Once Medusa's head is removed from the box, a whole series of events can occur," he complained. "Maybe [the publisher] signs up three books for $1 million, and the first book doesn't do so well, and they use this clause to get around what's legal and fair. This is like dropping a pebble in a pond: there are a lot of ripples."

Mary Rasenberger, president of the Authors Guild, who has seen some of the morality clauses publishers are using, said she also understands why houses are moving in this direction. "There are instances where it is appropriate to cancel a contract with someone—if, say, they are writing a book on investing and they're convicted of insider trading." But Rasenberger has concerns about the new boilerplates she's been seeing. "These clauses need to be very narrowly drawn. The fear is that clauses like these can quash speech that is unpopular, for whatever reason."

Another agent admitted to being distressed by the fact that some of the morality clauses she's seen "are going very far." She said that though she and many of her colleagues think it's "not unfair for a publisher to expect an author to be the same person when it publishes the book as when it bought the book," she's worried how extreme some of the language in these new clauses is.

"If you're buying bunny books or Bible books, these clauses make sense," said Lloyd Jassin, a lawyer who specializes in publishing contracts, referring to deals for children's books and Christian books. He wondered, though, about a publisher trying to hold authors of any other type of book to a moral standard. Noting that morality clauses are about money, not morality (specifically, they're about a publisher's ability to market an author), he posed a hypothetical. "Is the author of *The El Salvador Diet*, which touts a fish-only regimen, allowed to be photographed eating at Shake Shack? That goes to the heart of the contract." He paused and added: "This is definitely a free speech issue."

Sources at the major publishing houses, who also spoke on the condition of anonymity, said agents have been largely

receptive to the fact that publishers need to protect themselves from unexpected—and potentially extreme—behavior by authors. None of the sources at the publishers said they felt free speech was at issue here.

“[The agents] have gotten [these clauses] and understood they’re addressing the current marketplace reality,” said one insider at a major house. A source from another Big Five house said, “We’re not trying to be the morals police here,” before adding that this change is simply “a sign of the times.”

Richard Curtis, a veteran agent with his own firm, disagreed. “The Terror was also a sign of the times,” he said (referring to the period following the French Revolution when thousands were put to death by the revolutionary government). For Curtis, the answer to morality clauses is to fight them into nonexistence. “The agents must find their cojones to stand up against this kind of control. They must.”

A version of this article appeared in the 04/30/2018 issue of *Publishers Weekly* under the headline: In the #MeToo Moment, Publishers Turn to Morality Clauses

Warner Bros becomes the first major studio to embrace inclusion company-wide

By **LUCHINA FISHER and MICHAEL ROTHMAN via GMA**
Sep 6, 2018, 2:18 PM ET

Ava DuVernay talks inclusion riders, working with Oprah in 'A Wrinkle In Time'

Months after Frances McDormand popularized the term "inclusion riders," Warner Bros became the first major studio to adopt a company-wide commitment to diversity and inclusion.

WarnerMedia, the parent company of Warner Bros, announced on Wednesday that the studio, along with its sister companies HBO and Turner, will launch the initiative with the film "Just Mercy," starring Michael B. Jordan.

The "Black Panther" star was one of the first actors to commit to using inclusion riders, which allow actors to require diversity in the cast and crew of a film production as part of their contracts.

The term went viral after Frances McDormand used it during her powerful acceptance speech after winning the best actress Oscar earlier this year. "I have two words to leave with you tonight, ladies and gentlemen: Inclusion rider," she said, concluding her speech.

Frances McDormand accepts the award for best performance by an actress in a leading role at the Oscars, March 4, 2018.

More: Frances McDormand 'just found out' about inclusion riders, and 'we're not going back'

A week later, Jordan announced that his company, Outlier Society Productions, would add inclusion riders on all future deals.

On Wednesday, the 31-year-old actor said on social media, "Inclusivity has always been a no-brainer for me, especially as a black man in this business. It wasn't until Frances McDormand spoke the two words that set the industry on fire — inclusion rider — that I realized we could standardize this practice."

He continued, "Earlier this year I formally pledged my production company, Outlier Society, to this way of doing business. And today, the @warnermediagroup family has announced a new policy that accomplishes our shared objectives. I applaud them for taking this enormous step forward and I'm proud that our film, 'Just Mercy,' — which begins production today — will be the first to formally represent the future we have been working toward, together."

He concluded his post with, "This is just the beginning..."

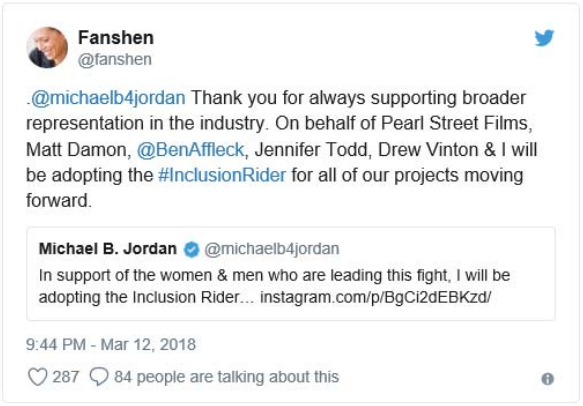
Warner Bros becomes the first major studio to embrace inclusion company-wide - ABC News

Inclusivity has always been a no-brainer for me, especially as a black man in this business. It wasn't until Frances McDormand spoke the two words that set the industry on fire —inclusion rider — that I realized we could standardize this practice. Earlier this year I formally pledged my production company, Outlier Society, to this way of doing business. And today,the @warnermediagroup family has announced a new policy that accomplishes our shared objectives. I applaud them for taking this enormous step forward and I'm proud that our film, Just Mercy, — which begins production today — will be the first to formally represent the future we have been working toward, together. This is just the beginning...

A post shared by Michael B. Jordan (@michaelbjordan) on Sep 5, 2018 at 10:45am PDT

More: Matt Damon, Ben Affleck's company will use inclusion riders on future projects

Oscar winners Brie Larson, Matt Damon and Ben Affleck have also committed to using inclusion riders.



But WarnerMedia is the first major entertainment company to establish a company-wide policy embracing the concept behind inclusion riders. In a statement, obtained by ABC News, the company said that it "pledges to use our best efforts to ensure that diverse actors and crew members are considered for film, television and other projects, and to work with directors and producers who also seek to promote greater diversity and inclusion in our industry."

The statement continued, "To that end, in the early stages of the production process, we will engage with our writers, producers and directors to create a plan for implementing this commitment to diversity and inclusion on our projects, with the goal of providing opportunities for individuals from under-represented groups at all levels. And, we will issue an annual report on our progress."

Warner Bros becomes the first major studio to embrace inclusion company-wide - ABC News

Ben Affleck and Matt Damon speak onstage during the 89th Annual Academy Awards at Hollywood & Highland Center on … m

Stacy L. Smith, the founder of the Annenberg Inclusion Initiative at the University of Southern California, was the first to float the idea of inclusion riders at a TED conference in 2016, at which she presented a slew of "really depressing" facts about gender inequality in film.

"An equity rider by an A-lister in their contract can stipulate that those roles reflect the world in which we actually live," Smith during her TED Talk. "Now, there's no reason why a network, a studio or a production company cannot adopt the same contractual language in their negotiation processes."

Smith went on to explain the advantages of actors' pursuing riders, which she offered as a possible solution to the "inclusion crisis in Hollywood."

> "The typical feature film has about 40 to 45 speaking characters in it. I would argue that only eight to 10 of those characters are actually relevant to the story," she added. "The remaining 30 or so roles, there's no reason why those minor roles can't match or reflect

the demography of where the story is taking place."

More: Hollywood has made 'no progress' for female characters on screen, study shows

Earlier this year, Smith released her latest report showing that there has been "no progress" for women on-screen over the last decade. An analysis of the top 100 films from 2017 found only 31.8 percent of the characters with dialogue were women -- about the same amount as it has been for the past 11 years.

Meanwhile, white men occupied more than twice the number of speaking roles as women in 2017.

"Even with the cacophony of voices crying out for inclusion and workplace safety... Hollywood hasn't really responded to the only thing that would create change," Smith told ABC News at the time of the study's release.

She cited hiring as the single best way to create parity. "Until those hiring practices change, none of these numbers are going to change," she said.

Warner Bros' announcement was greeted favorably by industry watchers.

"The inclusion rider creates an opportunity for leaders like Michael B. Jordan and Warner Bros to use their powers for good, bringing inclusion and diversity to an industry that has traditionally lacked both," Kalpana Kotagal, partner at Cohen Milstein Sellers and Toll and a co-author of the inclusion rider, told ABC News in an emailed statement. "Commitments like this are exactly what the inclusion rider was designed to galvanize, both in Hollywood and far beyond."

Melissa Silverstein, the founder of the website Women and Hollywood, also cheered the news.

"A studio taking the lead like this is a really strong indication that this is going to be something that is going to make them money and they also believe they are doing the right thing," she told ABC News.

As for Jordan being one of the first actors to come out strongly in favor of inclusion riders, she said, "He pushed and that's what you need. You need leaders to stand up and say this is what we're going to do. It's no coincidence that the person that runs the (Warner Bros) studio is a person of color (Kevin Tsujihara)."

Hollywood, which is often slow to change is finally recognizing what audiences have been saying for some time: "the world has shifted, and they are saying that with their dollars," Silverstein said.

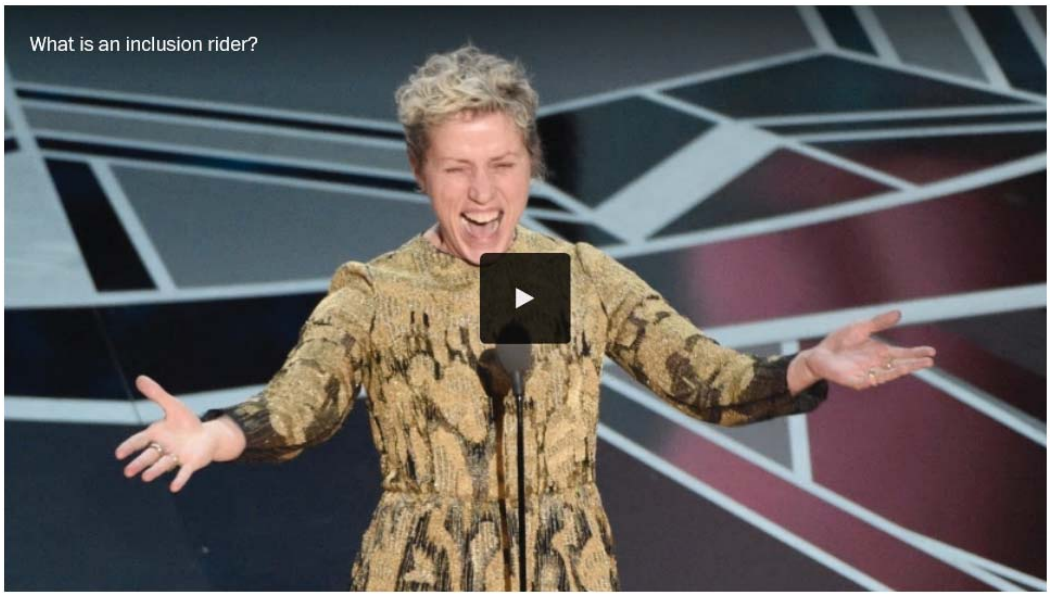
She pointed to the recent success of "Black Panther" and "Wonder Woman" and the current box-office leader "Crazy Rich Asians" as examples of diversity paying off at the box office.

"The days of the white-male protagonist being the only thing we have access to at the multiplex are over," she said. "And I will be happy when it also moves into the awards."

The Washington Post
Democracy Dies in Darkness

Opinions

The ‘inclusion rider’ should be a Hollywood standard



Frances McDormand used her Oscars best actress acceptance speech to highlight “inclusion riders.” Here’s how it could change representation in films. (Amber Ferguson/The Washington Post)

By Kalpana Kotagal
Opinions
March 9

Kalpana Kotagal is a partner in the Civil Rights & Employment practice group at Cohen Milstein Sellers & Toll and chair of the firm’s Hiring and Diversity Committee.

Last Sunday evening, I turned off the Academy Awards just a few minutes before Frances McDormand won her much-deserved Oscar. The following morning, I awoke to the startling — but wonderful — news that, while I slept, a project I had been quietly working on for months had been catapulted into public awareness by the year’s best actress during her acceptance speech.

McDormand had concluded her remarks with two cryptic words — “inclusion rider” — which prompted a flurry of Web searches around the globe to figure out what she was talking about. As an author of the inclusion rider, I was personally thrilled by the shout-out; as a woman of color living in a society that still struggles to fully value and promote diversity, I think McDormand’s elevation of the inclusion rider was critically important for all of us.

For decades, Hollywood has been run primarily by straight, white men. One tragic consequence of this reality has become all too clear through the #MeToo movement. A less visible result is that women, people of color, members of the LGBTQ community and other underrepresented groups have disproportionately faced more difficult hurdles to break into the industry —whether in front of or behind the camera. We see this reflected in the pool of Oscar nominees. This year, for example, Greta Gerwig became only the fifth woman, and Jordan Peele only the fifth African American, to be nominated as best director. Ever. The industry’s monolithic leadership model has contributed to a lack of variety in storytelling as well — limiting which stories get told and which movies get made. We are finally starting to see cracks in that monolith, but they are still just cracks.

In basic terms, the inclusion rider is an addendum to a leading actor’s contract that stipulates a process for ensuring minority representation in the audition and interview pools for a film or television project, and establishes objectives and tracking requirements for casting and hiring. The rider creates a flexible mechanism for Hollywood’s most influential players to wield their power to create opportunities for people from underrepresented groups to enter the industry.

The provision also imposes financial penalties on projects that don’t engage in good-faith efforts to find qualified individuals from diverse backgrounds and opportunities to publicize and celebrate successes. It has generally been used as it was written, but it can be adapted to fit a particular contract.

It is important to note that, while the inclusion rider mandates consideration and encourages hiring, it is in no way a quota. In the highly competitive industry of Hollywood, building a team that is both qualified and diverse is not a heavy lift, and concerns about “reverse discrimination” are misplaced.

The need for a new model for the industry has long been clear, but the path toward achieving it has been less obvious. The inclusion rider grew from multiple people approaching the problem from different perspectives. My background as a civil rights and employment lawyer gave me deep experience crafting workplace best practices. Stacy Smith, the founder and director of the University of Southern California’s Annenberg Inclusion Initiative, has researched and fought for equality in film and television for years, as has Fanshen Cox DiGiovanni , the head of strategic outreach at Pearl Street Films. It was my colleague Anita Hill who saw the potential for collaboration and brought us together. Together, we transformed Stacy’s general concept for an inclusion rider into a detailed framework grounded in specific legal language.

The true power of the inclusion rider is that it simply embodies best employment practice. A study published in the journal Financial Management this year found that companies that promote diverse workforces — specifically including women, people of color and members of the LGBTQ community — develop more innovative product pipelines, which lead to stronger financial performance. I strongly believe that once the entertainment industry begins to adopt the practices stipulated in the text of the inclusion rider, and experiences the associated benefits, it will embrace them as standard. The same could happen in other industries as well, including media, health care, financial services and technology. If inclusion riders become commonplace over the next few years, I believe they could be rendered obsolete within 10 or 20 years. Nothing would make me happier.

I am grateful to McDormand for opening a national conversation about the inclusion rider and what it could achieve. Now is the time for A-listers to step up, to use their clout to open the floodgates to talent in all its forms and origins, and to help build an entertainment industry that truly reflects — and celebrates — our multifaceted world.

Mixing Work and Athletics: A Primer on Sports Law from the #MeToo Perspective

Introduction

As the #MeToo movement continues to grow, professionals in all fields are compelled to take a second look at their actions, policies, and practices to stay up to date on all requirements – legal, societal, and others – and minimize risk of legal exposure. This primer aims to explain and clarify some of the high-profile legal authorities on how the #MeToo movement could affect professional and amateur athletes, and the teams or universities they call "home," in the coming years. This primer is intended to touch on the high points of the ever-changing legal landscape of #MeToo, and is not meant to be an exhaustive review of all relevant points. It should be used for educational and informational purposes only and is not legal advice or an opinion about specific facts.

Selected Federal, New York State, and New York City Authorities Relevant for the #MeToo Movement

Title VII

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, the primary federal statutory authority prohibiting harassment based on sex and gender in the workplace. Harassment is prohibited as a form of discrimination. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 106 S.Ct. 2399, 2404 (1986) (citing Guidelines published by the EEOC in 1980). Only very recently did the Second Circuit hold that Title VII prohibits discrimination based on an individual's sexual orientation. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (also equating gender stereotyping to sexual harassment "and other evils long recognized as violating Title VII," *id.* at 115).

Title IX

Whereas Title VII applies in the workplace, Title IX applies to educational institutions that receive federal financial assistance from the U.S. Department of Education, and is enforced by the Department's Office for Civil Rights. Title IX requires these institutions – which includes most universities with major athletic teams – to operate in a nondiscriminatory manner. Because there is still an open question on whether student-athletes are employees of their respective educational institutions, Title IX, rather than Title VII, is the federal authority used to prohibit discrimination on college campuses.

Title VII and Title IX (and now New York State, as discussed below) both protect non-employees from harassment by employees. This means that an employer may be held liable if an employee sexually harasses a non-employee, such as a student, vendor, or contractor. For example, if an assistant coach sexually harasses student-athletes on a university's basketball team, the student-athletes may be able to hold the university liable for the assistant coach's actions. Under the New York State law, penalties may be more severe if the student-athletes can show that the assistant coach was a repeat offender and/or that the school failed to take steps to protect the student-athletes.

Tax Cuts and Jobs Act of 2017

In December 2017, Congress passed the Tax Cuts and Jobs Act, which contained one small but potentially powerful provision in response to #MeToo. Under § 162(q) of the Internal Revenue Code, effective January 1, 2018, the dollar value of settlement or "hush" payments, as well as the attorneys' fees incurred in achieving those settlements or payments, can no longer be deducted on federal tax returns, if the settlement or payment includes a non-disclosure provision. This could vastly increase the cost to alleged harassers (or their employers) of these payments, since it implicates an entirely new calculation as to how settlements and other payments will affect the individual's (or company's) bottom line.

Interestingly, although § 162 is titled "trade or business expenses," tax experts have questioned whether this amendment could apply to, and therefore inadvertently harm, alleged victims or claimants on the receiving side of sexual-harassment settlements or provisions. As discussed below, publicity of a sexual-harassment claim is a potential barrier to reporting or litigating these claims, and claimants and alleged victims might prefer to sign a non-disclosure agreement if it could protect their identities or careers. However, if claimants are affected by this new § 162(q), they may be compelled to rethink including a non-disclosure provision on settlement or other payment agreements. Alternatively, claimants may simply increase the dollar value that they seek, in order to compensate for the new prohibition on deductions. (Conversely, alleged harassers, on the other side of the equation, will be seeking to minimize these payments as much as possible, to limit the impact on their bottom line.)

New York State Laws on Sexual Harassment

On April 12, 2018, New York State passed a handful of statutory amendments as part of its budget bill for the upcoming financial year. These included amendments to the New York State Human Rights Law and the New York Labor Law, all intended to prevent workplace sexual harassment. The major points of these laws are summarized in the appendices attached hereto.

New York City #Stop Sexual Harassment in NYC Act

In May 2018, New York City also passed a set of laws aimed at preventing workplace sexual harassment. The major points are summarized in the appendices attached hereto.

Impact for Student-Athletes and Other "Non-Employees"

Under the recently added New York Labor Law § 296-d, non-employees (such as contractors, vendors, consultants, and student-athletes) have a new avenue for redress against an employer (such as a university or professional sports team) if they are sexually harassed by that employer's employee(s), under certain circumstances. This law applies equally to both educational institutions and professional sports leagues. Before the enactment of § 296-d, non-employees had little-to-no recourse when sexually harassed in an employer's workplace by that employer's employees. Now, employers may be held liable if their employees sexually harass non-employees in the workplace, as long as the employer i) knew or should have known that the non-employee was subject to harassment and ii) failed to take "immediate and appropriate corrective action."

While most schools are already held to this standard under federal Titles VII and IX, the New York State law increases the avenues and methods for redress for sexual harassment committed

by a school employee against a non-employee, such as a student-athlete. Outside of the school context, this also means that any member(s) of the general public can hold professional sports teams or leagues accountable for the actions of their players. This is particularly impactful when considering what might constitute evidence such that an employer "should have known" that an employee might end up sexually harassing a non-employee in the workplace. As discussed above, being able to show that the harasser was a "repeat offender" – perhaps if he or she has appeared in the news for such behavior in the past – or even showing that, due to the individual's demeanor or other history, the employer should have known that sexual harassment could be an issue in the future, could implicate harsher penalties for the employer.

Behaviors Considered "Sexual Harassment"

The definition of sexual harassment, and in particular, actionable sexual harassment, may change depending on the context. Under Title VII, sexual harassment is defined as "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

The definition under the New York State Human Rights Law – which is now required to be included in all anti-sexual-harassment policies for employers in New York – is a bit more expansive. There, sexual harassment is considered "unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;
- Such conduct is made either explicitly or implicitly a term or condition of employment; or
- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment."

Each jurisdiction also provides examples of sexual harassment. The National Collegiate Athletic Association (NCAA) has also published examples of interactions that could constitute sexual harassment:

NCAA Examples	NY City, NY State, and Federal Examples
- Posting of sexually suggestive pictures; - Consistently telling "dirty" jokes or stories in front of the team; - Tolerating staff or student-athletes who make sexually suggestive remarks about other staff or students within earshot of others; - Allowing the use of derogative terms with a sexual connotation to be used	- Physical acts of a sexual nature, such as: o Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body; o Rape, sexual battery, molestation or attempts to commit these assaults. - Unwanted sexual advances or propositions, such as: o Requests for sexual favors accompanied by implied or overt threats concerning

to describe coworkers or team members; - Allowing frequent physical contact, even when it is not sexual.	the target's job performance evaluation, a promotion or other job benefits or detriments; o Subtle or obvious pressure for unwelcome sexual activities. - Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment. - Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look. - Sexual or discriminatory displays or publications anywhere in the workplace, such as: o Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace. - Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as: o Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job; o Sabotaging an individual's work; o Bullying, yelling, name-calling. - Sexual comments - Jokes - Innuendo - Pressure for dates - Sexual touching - Sexual gestures - Sexual graffiti

New York City's Unique Take

Under federal law (and in many states), a claimant must be able to demonstrate that sexual harassment was "severe and pervasive." However, New York City's standard is much more claimant-friendly. To prove sexual harassment under New York City laws, a claimant need only show that the interaction rose above the level of "petty slights and trivial inconveniences." *See, e.g., Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102 (2013) (denying defendant's motion for summary judgment in determining that plaintiff could show that the actions amounted to more than "petty slights and trivial inconveniences"). Thus, while claimants may still be held to the "severe and pervasive" standard for purposes of calculating damages, they are more likely to be able to establish liability when bringing a claim under this New York City standard.

Bringing a Civil Action for, and Defenses against, Sexual Harassment

Barriers to Reporting and Litigating

Barriers to reporting sexual harassment can include, but are certainly not limited to:

1. uncertainty about how to report, what the process looks like, what might ensue, and how it could affect the reporter's (or alleged harasser's) career;
2. awkwardness over having to discuss sexual matters with a workplace administrator;
3. helplessness if the reporting process is difficult to navigate, or if the workplace administrator (e.g. HR) doesn't provide satisfactory, tangible closure;
4. overworking, where the reporter is too busy with other areas of their life to take the time and effort required to report and cooperate with an investigation;
5. fear over potential consequences, not only within the immediate workplace but how it might affect the reporter outside of work; and
6. stigma and stereotyping, which encompasses many considerations, but particularly if the reporter is a man, since there is a misperception about whether men can be sexually harassed.

Barriers to litigating are often similar to barriers to reporting, but with the additional consideration of unwanted publicity: whereas internal investigations are often kept as confidential as possible, the information contained in a complaint filed in court is wholly public. As discussed elsewhere in this document and attached hereto, federal and New York State legislation have made it much more expensive to include non-disclosure agreements in claims for sexual harassment. Thus, even before getting to court, a claimant must now pay even closer attention to how public he or she is willing to get with a settlement or "hush" payment.

Mandatory Arbitration Provisions

As of July 11, 2018, New York State prohibits employers from including mandatory arbitration provisions of any contract to be "null and void" to the extent that the provision applies to sexual-harassment claims. However, the law has a savings clause which states that it does not apply where it would be "inconsistent with" federal law, i.e., the Federal Arbitration Act. As a result, if the contract (generally, a settlement agreement) falls within the ambit of the FAA, then NY's prohibition will not apply.

Non-Disclosure Agreements

Under NY State law, settlements for sexual harassment claims may not include NDAs unless such provisions are at the "complainant's preference." It is not entirely clear what that means (for example, whether it is a per se violation if an employer drafts an agreement that includes an NDA without the complainant explicitly asking for it), but NY State has suggested that a complainant's "preference" will be evidenced upon his/her signing the agreement.

Conclusion

In the ongoing #MeToo movement, legislatures of all jurisdictions are taking a closer look at their laws against sexual harassment, including the standards of proof and liability to which claimants are held, avenues for redress, and other considerations. While this discussion focused on recent developments in New York City and New York State, it is highly likely that other states will follow with similar provisions banning mandatory arbitration, placing restrictions on non-disclosure agreements, and, meanwhile, increasing means for reporting sexual harassment. For example, California has considered adopting the New York City standard of imposing liability for any interaction amounting to more than "petty slights and trivial inconveniences." *See* "California to Consider New York City's Legal Standard for Sexual Harassment," THE OBSERVER (Jan. 11, 2018), *available at* https://observer.com/2018/01/new-york-california-sexual-harassment-legal-standard/ (last visited Oct. 3, 2018). The New York State and New York City documents that follow this document are examples of the stricter steps that jurisdictions may begin to see across the country. For example, in New York City, employers are required to hand new hires a Fact Sheet on workplace sexual harassment, as well as post a notice on workplace sexual harassment. In the rest of New York State, employers are required to make available a standardized complaint form for employees (or non-employees) to report alleged instances of sexual harassment. As claims for sexual harassment may be actionable in the jurisdiction in which they occur, it is imperative that sports leagues or teams that travel throughout the country remain up-to-date on the latest legislative moves in each jurisdiction, and maintain a watchful eye for any other #MeToo developments in the coming months and years.

Legal Alert

New York State Announces Final Workplace Sexual Harassment Rules

This is on top of implications from the federal Tax Cuts and Jobs Act, enacted in December 2017, and New York City's #Stop Sexual Harassment in NYC Act, enacted in May 2018. The analysis below integrates recent changes from federal, NY State, and NY City authorities to provide a holistic picture of what this all really means for employers.

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	I have an office within the five boroughs of NYC, and nowhere else in New York.	I have an office in upstate New York or Long Island and in New York City.	I have an office in upstate New York or Long Island, and at least one employee goes into NYC.	All of my offices are outside of New York, but at least one employee performs services within the five boroughs of NYC.	I have an office in upstate New York or Long Island, and my employees never go into NYC.	All of my offices are outside of New York, but at least one employee spends a "portion of their time" within New York State.
May not deduct value of settlement payments, or related attorneys' fees, if settlement includes an NDA	x	x	x	x	x	x
May not include NDA's* in settlements, unless at the claimant's preference; and if so, must allow 21 days to consider and 7 days to revoke	x	x	x	x	x	x
May not impose mandatory arbitration on sexual-harassment claims	x	x	x	x	x	x
Annual training	x	x	x	x	x	x
New policy	x	x	x	x	x	x
Non-employees are protected by laws	x	x	x	x	x	x
Claimant has 3 years to bring a claim	x	x	x	x		
Fact sheet for new hires	x	x	*	*		
Display poster	x	x	*	*		

Awaiting final clarification on how this will apply

Current as of October 4, 2018

Settling A Claim Related to Sexual Harassment and Including a Non-Disclosure Provision:

If a settlement for sexual-harassment includes a non-disclosure agreement, employers may no longer deduct the amount of the settlement, nor attorneys' fees related to the settlement.

Within New York State, employers may only include non-disclosure agreements in settlement of sexual harassment claims if:

- Inclusion of a non-disclosure provision is the claimant's preference; *and*
- The claimant is given 21 days to consider the agreement and 7 days post-execution to revoke acceptance.

Prohibition on Mandatory Arbitration of Sexual-Harassment Claims:

In New York State, while employers may still include mandatory-arbitration provisions in employment agreements or other documents, employers may no longer apply these provisions to sexual harassment claims. Any agreements that do include these claims will be declared null and void to the extent that they purport to include sexual-harassment claims, and they will not be enforced.

Providing Annual Trainings:

The first annual training must be completed by **October 9, 2019**. We strongly recommend holding your training well before the deadline, as effective trainings are a potential key way to minimize legal vulnerability.

In New York, if an employer already conducted a compliant training earlier in 2018, the employer need not hold a new training. If the prior training was only partially compliant, the employer will need to hold a "supplemental" training, to fill in the gaps before October 9, 2019.

Employers with offices located within and outside the State do not need to train the employees in out-of-state offices, unless those employees spend "a portion of their time" in New York State.

The training must be "interactive." Examples include:

- Web-based training that includes questions at the end of each section; or
- Web-based training that includes the opportunity for employees to submit questions online and receive responses in a timely manner; or
- In-person training in which a presenter asks questions of employee-participants, or gives them time to ask questions during the training; *or*
- For any training, including a feedback survey for employees to submit after the training.

The final NY State rules encourages employers to hold additional, separate trainings for managers or supervisors beyond the training used for all other employees.

Given the prohibition on deducting the cost of sexual-harassment settlements that include non-disclosure agreements, and related attorney's fees, it is more important than ever that employers remain fully committed to avoiding exposure to a claim of workplace sexual harassment. We recommend the use of live trainers for the trainings for managers and supervisors, to enhance the likelihood they will truly understand how to identify and address the problem before it becomes a significant issue or litigation.

Implementing a New Policy

All New York State employers are required to implement a new policy, in compliance with State requirements, by **October 9, 2018.** Employers must distribute, in writing or via email, a particularly detailed policy which describes examples of sexual harassment, forums for redress, investigation procedures, a statement against retaliation, and other information.

Employers must also create a standard complaint form for employees to report workplace sexual harassment. The policy must indicate where employees can find the complaint form.

Protection for Non-Employees:

The New York State law protects all individuals who are sexually harassed in the workplace, whether or not they are on your payroll. If anyone in that category, such as a contractor, consultant, volunteer, or unpaid intern, is sexually harassed by your employees in your or their workplace, your company could be held liable.

Three Years to Bring a Claim:

New York City currently requires all claims under the New York City Human Rights Law to be brought within one year of the interaction that led to the claim. However, if a claimant makes an allegation of gender-based discrimination (which includes, but is not limited to, sexual harassment), the claimant now

has three years to bring that claim.

New Hires:

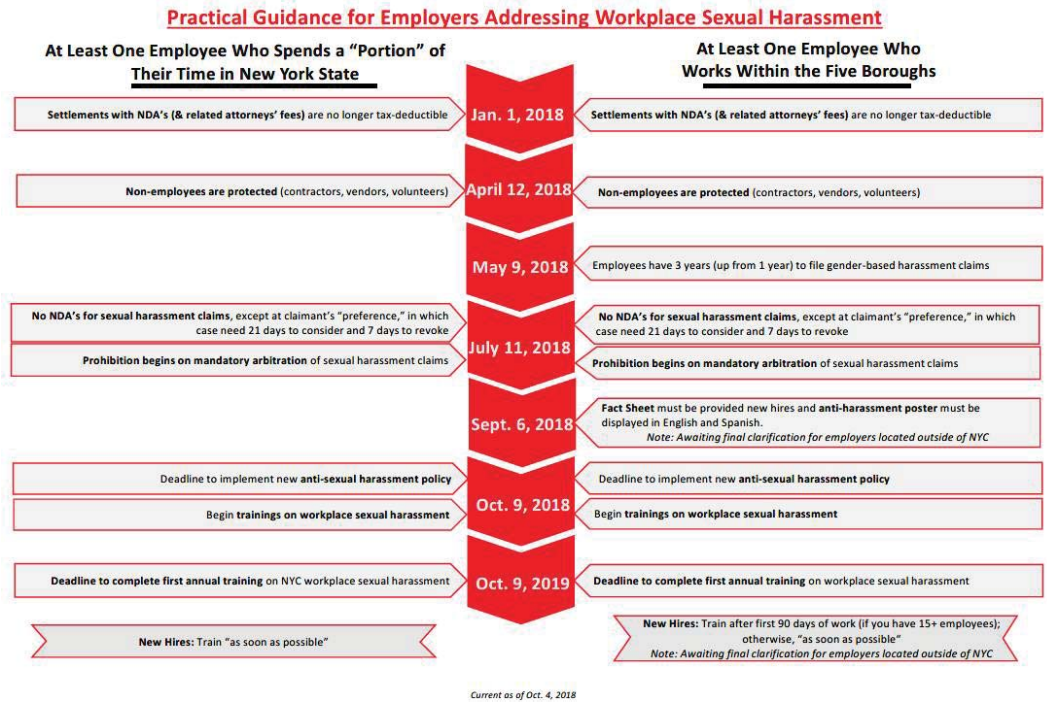
Fact Sheet: All new hires in New York City must be provided with this fact sheet upon commencement of work.

Poster Display: All New York City employers must display this poster in the workplace.

New-Hire Trainings: New hires in upstate New York and Long Island must undergo training "as soon as possible." For new hires working in NYC, the training is only required once they have been employed for 90 days, and have worked within the five boroughs for at least 80 hours in the current calendar year.

The training requirement for a new hire is deemed satisfied if that new hire can verify that he/she has undergone training with a previous employer in the same calendar year. However, the burden is still on the new employer to ensure that the employee is familiar with the new policies and his/her responsibilities under them.

> **Please Note:** The NYC Commission on Human Rights has not yet clarified whether employers located outside of New York City, who have at least one employee performing work within the five boroughs, will be required to provide fact sheets and display the poster.



New York State Workplace Sexual Harassment Rules

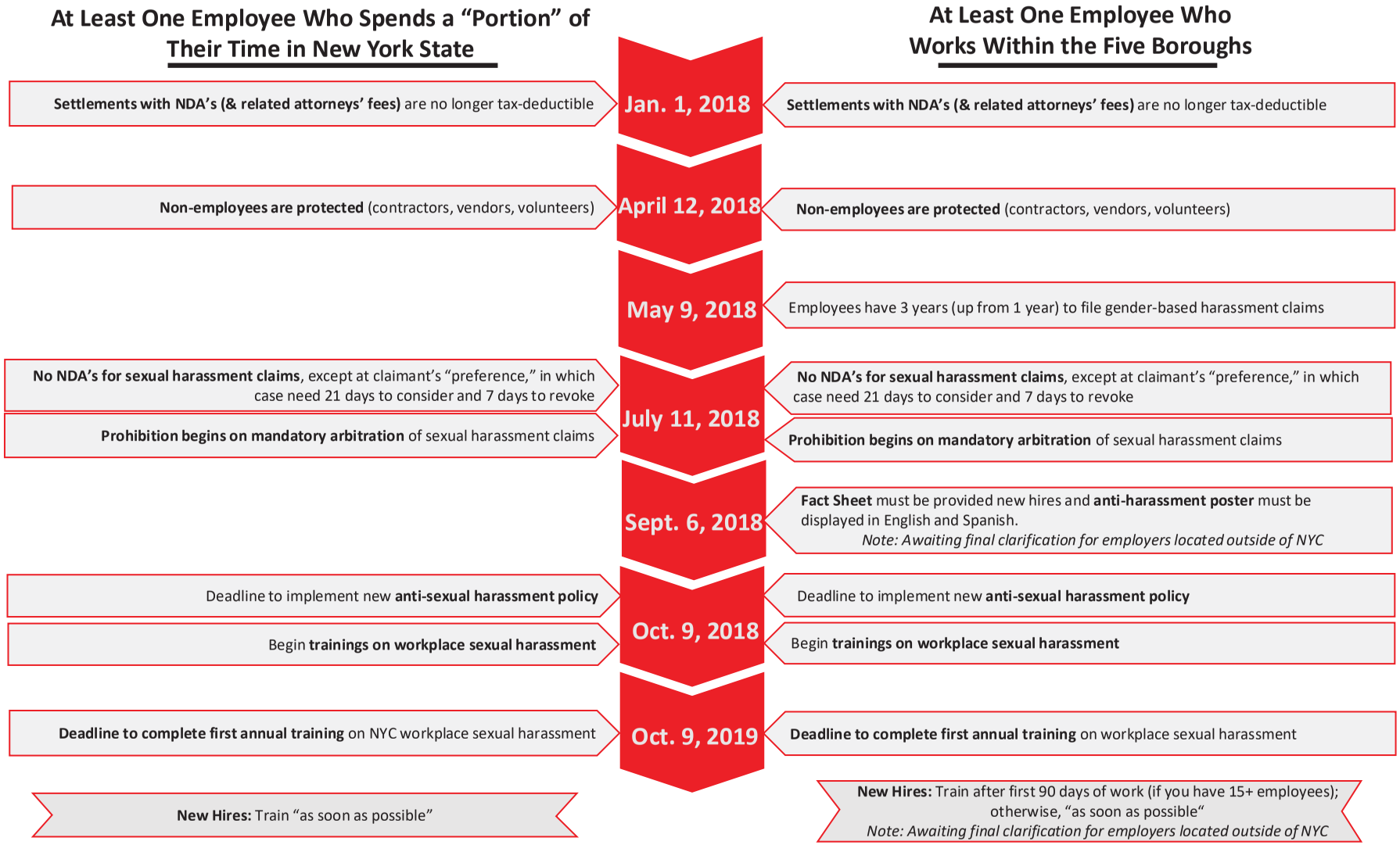
Practical Guidance for Employers

	I have an office within the five boroughs of NYC, and nowhere else in New York.	I have an office in upstate New York or Long Island and in New York City.	I have an office in upstate New York or Long Island, and at least one employee goes into NYC.	All of my offices are outside of New York, but at least one employee performs services within the five boroughs of NYC.	I have an office in upstate New York or Long Island, and my employees never go into NYC.	All of my offices are outside of New York, but at least one employee spends a "portion of their time" within New York State.
May not deduct value of settlement payments, or related attorneys' fees, if settlement includes an NDA	X	X	X	X	X	X
May not include NDA's* in settlements, unless at the claimant's preference; and if so, must allow 21 days to consider and 7 days to revoke	X	X	X	X	X	X
May not impose mandatory arbitration on sexual-harassment claims	X	X	X	X	X	X
Annual training	X	X	X	X	X	X
New policy	X	X	X	X	X	X
Non-employees are protected by laws	X	X	X	X	X	X
Claimant has 3 years to bring a claim	X	X	X	X		
Fact sheet for new hires	X	X	*	*		
Display poster	X	X	*	*		

* Awaiting final clarification on how this will apply

Current as of October 4, 2018

Practical Guidance for Employers Addressing Workplace Sexual Harassment



Current as of Oct. 4, 2018

Model Complaint Form for Reporting Sexual Harassment

NEW YORK STATE | Combating Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted]*. You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

Adoption of this form does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

STOP SEXUAL HARASSMENT ACT FACTSHEET

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the information sheet requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, can require the violator to undergo training, and can mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

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State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law, where statutes of limitations vary.

To file a complaint with the New York State Division of Human Rights, please visit the Division's website at **www.dhr.ny.gov**.

To file a charge with the U.S. Equal Employment Opportunity Commission (EEOC), please visit the EEOC's website at **www.eeoc.gov**.

@NYCCHR

NYC.gov/HumanRights

NYC Commission on Human Rights

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#MeToo and Legislation Geared Toward the Prevention of Sexual Harassment

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New Legislation on Sexual Harassment in New York and California Holds Insights Into the #MeToo Movement's Impact on Employers Nationwide

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The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget signed on April 12, 2018 contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training, and settlements of sexual harassment cases immediately. Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City. These pieces of legislation will significantly affect the handling of sexual harassment cases by all employers in the State of New York — and offer insight into what employers operating elsewhere should expect. California has been the latest state to propose some widespread sweeping legislation to combat sexual harassment in the workplace, and others are sure to follow.

New York State Legislation on Sexual Harassment

In the fiscal year 2019 budget, the New York State Legislature passed several new laws aimed at preventing workplace sexual harassment, including banning mandatory arbitration and requiring anti-harassment policies and training. Governor Cuomo signed them into law on April 12, 2018. Below are the highlights of the changes for employers. On August 23, 2018, the New

York State Department of Labor launched a website containing proposed guidance, model policies, frequently asked questions (FAQs) and information regarding the new requirements. It was subject to public comment through September 12, 2018. On September 30, 2018, the final guidance was released to the public.

Definition of Sexual Harassment

Although "sexual harassment" was not completely defined in the legislation that was passed, it was defined in the FAQs, model policy, and training. It follows the traditional definition that has been outlined by the Equal Employment Opportunity Commission (EEOC) and case law, but also includes sexual orientation, gender identity, and transgender status. The definition also includes "sex stereotyping," which includes conduct or personality traits that do not conform to other people's ideas or perceptions, including harassment because an individual is performing a job traditionally performed by the opposite sex.[1]

Employers Liable For Sexual Harassment Of Non-Employees

Employers may be held liable under the state Human Rights Law, amended section 296-d[2] for an employee's sexual harassment of a non-employee, such as an independent contractor, subcontractor, vendor, consultant, or other person providing services pursuant to a contract in the workplace if the employer knew or should have known that the non-employee was being sexually harassed in the employer's workplace and failed to take immediate and appropriate corrective action. The extent of the employer's control over the harassing employee "shall be considered." The vague language in the law leaves room for interpretation by courts, and it

[1] Guidance and Policies Released September 30, 2018, FAQ's - https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers
[2] N.Y. Exec. Law § 296-d

remains to be seen how this law will be enforced. What is clear, however, is that employers face potential liability from a new class of individuals. This will result in changes in the way employers and vendors carry on business, as well as how regulatory and enforcement agencies conduct investigations.

Mandatory Arbitration for Sexual Harassment Prohibited

Employers cannot require employees to submit to arbitration for sexual harassment claims.[3] Any findings of fact or decision reached in claims that are subject to arbitration cannot be protected from judicial review. Any prohibited clause in a contract will be null and void. This law only applies to arbitration agreements entered into after July 11, 2018 and does not apply to collective bargaining agreements.

Use of Non-Disclosure Agreements for Sexual Harassment Settlements Limited

Any settlement of a sexual harassment claim may not include confidentiality provisions unless:

- all parties are provided with the non-disclosure terms or conditions;
- the complainant is given 21 days to consider the non-disclosure terms or conditions;
- after agreeing to and signing the non-disclosure terms or conditions, the complainant is given seven days to revoke the agreement.[4]

This law applies to any sexual harassment settlements, including private settlements, whether entered into before or during litigation. The complainant cannot waive the 21-day period by evidencing agreement within a shorter time frame (like the Age Discrimination in Employment Act).

[3] N.Y. Civ. Prac. L & R. § 7515 (2018).
[4] N.Y. Civ. Prac. L & R. § 5003-b (2018).

Required Sexual Harassment Policy and Annual Training

Effective **October 9, 2018**, all employers in New York State will be required to implement an anti-sexual harassment policy and to conduct annual interactive sexual harassment training pursuant to section 201-g of the New York Labor Law for all existing employees[5] by October 9, 2019.[6] While the proposed guidance required new employees be trained within 30 days of hire, the final guidance merely indicates that the state encourages training of new employees "as soon as possible".[7]

The policy must be in writing and must be distributed to all employees. While the law does not require an employee's signed acknowledgment of receipt, it is highly recommended.[8] In addition, distribution by electronic means is permissible as long as the employee has access to the policy during working hours and may print a hard copy.[9]

The guidance and documents released include:

- 20-page "training script" for employers[10]
- Draft policy[11]
- Model complaint form (which much be attached or included with the policy)[12]
- Minimum standards for the policy and training[13]
- Model power point for the training[14]

[5] Employees includes ALL employees, part time, seasonal and temporary.
[6] FAQ's https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelTraining.pdf
[11] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf
[12] https://www.ny.gov/sites/ny.gov/files/atoms/files/CombatHarassmentComplaint%20Form.pdf
[13] https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf ; https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf
[14] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionDRAFTTrainingPPT.pdf

- Sexual Harassment Prevention Employer Toolkit[15]

Employers may instead develop their own policies and programs, as long as they meet the minimum requirements set forth in the law.

The final documents clarified "interactive" training[16]:

> New York State law requires all sexual harassment training to be interactive. It requires some form of employee participation, meaning the training may:
> - Be web-based with questions asked of employees as part of the program;
> - Accommodate questions asked by employees;
> - Include a live trainer made available during the session to answer questions; and/or
> - Require feedback from employees about the training and the materials presented.

Required Sexual Harassment Certification in Government Bids

Effective January 1, 2019, any company bidding for a state contract with a state agency[17] will be required to certify, under penalty of perjury, that it has written sexual harassment policies and provides annual sexual harassment training to its employees in compliance with the model policies, trainings, and guidelines. For non-competitive bids or any other sales to state agencies, the agency may choose to require the same certification.

What Employers Can Do Now

1. Examine and update sexual harassment and other harassment and discrimination policies. Note, even though the law does not cover other forms of discrimination, we recommend including the other forms of discrimination, as well as reasonable accommodations, into the annual training requirement and policy.

[15] https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionToolkitforEmployers.pdf
[16] The definition is found in the training script and FAQ's.
[17] N.Y. State Finance Law § 139-1(1)(a)

2. Make sure any employee handbook or posting is updated to contain the new policy.
3. Post the employer's harassment and discrimination policy prominently in the workplace and in areas where non-employees are likely to be present.
4. Consider distributing the employer's harassment and discrimination policy to all non-employees and their contractors and employees so that the non-employees are aware of the company's mechanism for filing complaints. Provide for regular distribution on a schedule. Consider incorporating an obligation on the vendor/contractor to train its employees for sexual harassment in the contract, as well as to provide defense and indemnification in the event of an incident.
5. Begin to develop training. We are available to consult with the company for guidance pending the final release of the model policy, training, and regulations by the New York State Department of Labor and New York State Division of Human Rights.

Overview of New York City Law Regarding Sexual Harassment

On May 9, 2018, Mayor Bill DiBlasio signed into effect the New York City Stop Sexual Harassment in NYC Act, amending the New York City Human Rights Law (NYCHRL) to include mandates aimed at addressing sexual harassment in the workplace.

Mandatory Anti-Harassment Training

Effective April 1, 2019, the act requires employers with 15 or more employees (including interns) to conduct annual anti-sexual harassment training for all employees, including supervisory and managerial employees. The required training must cover topics including definitions and examples of sexual harassment, education on bystander intervention, and explanations of how to

bring complaints both internally and with the applicable federal, state, and city administrative agencies.

The act clarifies that, while such training must be "interactive," it need not be live or conducted by an in-person instructor to satisfy the interactivity requirement. The training must be conducted on an annual basis for existing employees; new employees who work 80 or more hours per year on a full or part-time basis in New York City must receive the training after 90 days of initial hire. If an employee has received training at one employer within the training cycle, he or she would be not required to receive additional training at a different employer until the next annual cycle. The act also provides that if an employer is subject to training requirements in multiple jurisdictions, it will be in compliance with the act so long as any annual training that is provided to employees addresses, at a minimum, the substantive requirements of the act. Additionally, the act requires employers to obtain from each employee a signed acknowledgment that he or she attended the training, which may be electronic.

The NYC Commission on Human Rights will be required to develop publicly available online sexual harassment training modules for employers' use. The act specifies that use of the modules will satisfy the requirements of the act so long as the employer supplements the module with information about the employer's own internal complaint process to address sexual harassment claims.

Notice of Anti-Harassment Rights and Responsibilities

Effective September 6, 2018, the act requires employers to conspicuously display an anti-sexual harassment rights and responsibilities poster in their employee breakrooms or in other

common areas in which employees gather. The Commission has published a poster to comply with that requirement on its website[18].

The act further provides that, also beginning on September 6, 2018, employers must distribute a fact sheet on sexual harassment to new hires, and may comply with that obligation by including it in an employee handbook. That fact sheet, which contains the same information as the poster, is also published on the commission's website[19]. The act requires that both the poster and information sheet be displayed, at a minimum, in both English and Spanish.

The act also requires the commission to post resources about sexual harassment on its website, including an explanation about sexual harassment as a form of unlawful discrimination, specific examples of sexual harassment and retaliation, information on bystander intervention, and information about filing a complaint through the commission and other government agencies.

Expansion of Anti-Discrimination Protections Under the NYCHRL

Effective immediately upon signing, the act amended the NYCHRL to permit claims of gender-based harassment by all employees, regardless of the size of the employer. (Currently, the anti-discrimination provisions of the NYCHRL apply only to employers with four or more employees.) The act also extends the statute of limitations for filing complaints with the commission of "claim[s] of gender-based harassment" under the NYCHRL from one year to three years after the alleged harassing conduct occurred — making the limitations period for administrative charges coextensive with the limitations period for filing claims in court. The act also amends the policy statement of the NYCHRL to state that "gender-based harassment threatens the terms, conditions, and privileges of employment."

[18] See: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Notice-8.5x11.pdf
[19] See: https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SexHarass_Factsheet.pdf

Requirements for City Contractors

Effective July 8, 2018, the act also amends the New York City Charter to require city contractors to include their practices, policies, and procedures "relating to preventing and addressing sexual harassment" as part of an existing report required for certain contracts pursuant to the City Charter and corresponding rules.

California Legislation Released to Combat Sexual Harassment

At the end of August 2018, California lawmakers passed a series of bills that grew out of the #MeToo movement. These bills were aimed at tackling the problem of sexual harassment as well as harassment and discrimination more broadly and contain a batch of new mandates for employers. On September 30, 2018, Governor Jerry Brown signed into law several of these bills.

No Waiver of Right to Testify Regarding Sexual Harassment

AB 3109 makes unlawful any settlement or contract term that requires a party to waive the right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. Specifically, the law applies where a party's testimony is required or requested pursuant to a court order, subpoena, or written request from an administrative agency or the legislature.

Non-Disclosure Clauses in Settlement Agreements

The Governor signed into law SB 820, which will prohibit confidentiality clauses in settlement agreements that prevent the disclosure of factual information relating to claims of sexual harassment, sexual assault, and sex discrimination. Additionally, courts will no longer be able to restrict the disclosure of such facts in relevant civil proceedings. However, the law will

allow a settlement agreement term that shields the identity of a claimant, and all facts that could lead to the disclosure of his or her identity, if included at the request of the claimant.

The Sexual Harassment Omnibus Bill

The strongest, and largest, sexual harassment bill is SB 1300. One provision of the bill says harassment cases are "rarely appropriate for disposition on summary judgment" and another instructs courts that the legal standard for sexual harassment "should not vary by type of workplace." Procedural rules would not be changed but the bill raises the bar for an employer to get summary judgment by making it harder for them to show that a single incident isn't enough to constitute harassment. SB 1300 would:

- Adopt or reject specified judicial decisions regarding sexual harassment — in each case expanding employer liability. Specifically, SB 1300 would (1) prohibit reliance on *Brooks v. City of San Mateo* to determine what conduct is sufficiently severe or pervasive to constitute actionable harassment, (2) disapprove any language in *Kelley v. Conco Companies* that might support different standards for hostile work environment harassment depending on the type of workplace, and (3) affirm *Nazir v. United Airlines, Inc.'s* "observation that hostile working environment cases involve issues 'not determinable on paper.'"
- Expand an employer's potential liability under the FEHA for acts of nonemployees to all harassment (removing the "sexual" limitation).
- Prohibit an employer from requiring an employee to sign (in specified circumstances) 1) a release of FEHA claims or rights or 2) a document prohibiting disclosure of information about unlawful acts in the workplace.
- Prohibit a prevailing defendant from being awarded attorney's fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.
- Authorize (but not require) an employer to provide bystander intervention training to its employees.

Sexual Harassment Training

SB 1343 extended California's requirement that employers with 50 or more employees provide supervisory personnel with antiharassment training to employers with five or more

employees. Further, the law will now require employers to ensure that all *non-supervisory* complete sexual harassment training.

Defamation Protection for Employers

AB 2770 treats internal sexual harassment complaints and decisions as "privileged communications" so long as they are disclosed without malice. The bill broadened the scope of the privilege and allows former employers to inform potential employers that they would not rehire a job applicant based on a prior determination by the former employer that the job applicant committed sexual harassment. As such, the "privileged" statement cannot be used to support a defamation suit under California law.

Expanding Harassment Liability in Entertainment and Politics

SB 224 includes additional examples of potential defendants who can be found liable for harassment under the California Civil Code. A defendant may be liable where he or she "holds himself out as being able to help the plaintiff establish a business, services, or professional relationship with the defendant or a third party." The law now includes elected officials, lobbyists, directors, and producers as potential defendants in a harassment suit.

Corporate Board Diversity

The legislature took aim at gender imbalance at the top of businesses in SB 826 mandating that public companies based in the state have at least one female (people who self-identify as women, regardless of their designated sex at birth) on their boards of directors by the end of 2019. By the end of 2021, corporations with five or more directors will be required to include at least two female members. Corporations failing to comply would face penalties ($100,000 for a first violation and $300,000 fine for further violations).

Sexual Harassment Policy for All Employers in New York State

NEW YORK STATE | Combating Sexual Harassment

Introduction

[*Employer Name*] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. All employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [*Employer Name's*] commitment to a discrimination-free work environment. Sexual harassment is against the law[1] and all employees have a legal right to a workplace free from sexual harassment and employees are urged to report sexual harassment by filing a complaint internally with [*Employer Name*]. Employees can also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws.

Policy:

1. [*Employer Name's*] policy applies to all employees, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business, regardless of immigration status, with [*Employer Name*]. In the remainder of this document, the term "employees" refers to this collective group.

2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action (e.g., counseling, suspension, termination).

3. Retaliation Prohibition: No person covered by this Policy shall be subject to adverse action because the employee reports an incident of sexual harassment, provides information, or otherwise assists in any investigation of a sexual harassment complaint. [*Employer Name*] will not tolerate such retaliation against anyone who, in good faith, reports or provides information about suspected sexual harassment. Any employee of [*Employer Name*] who retaliates against anyone involved in a sexual harassment investigation will be subjected to disciplinary action, up to and including termination. All employees, paid or unpaid interns, or non-employees[2] working in the workplace who believe they have been subject to such retaliation should inform a supervisor, manager, or [*name of appropriate person*]. All employees, paid or unpaid interns or non-employees who believe they have been a target of such retaliation may also seek relief in other available forums, as explained below in the section on Legal Protections.

[1] While this policy specifically addresses sexual harassment, harassment because of and discrimination against persons of all protected classes is prohibited. In New York State, such classes includeage, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.

[2] A non-employee is someone who is (or is employed by) a contractor, subcontractor, vendor, consultant, or anyone providing services in the workplace. Protected non-employees include persons commonly referred to as independent contractors, "gig" workers and temporary workers. Also included are persons providing equipment repair, cleaning services or any other services provided pursuant to a contract with the employer.

Adoption of this policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

4. Sexual harassment is offensive, is a violation of our policies, is unlawful, and may subject [*Employer Name*] to liability for harm to targets of sexual harassment. Harassers may also be individually subject to liability. Employees of every level who engage in sexual harassment, including managers and supervisors who engage in sexual harassment or who allow such behavior to continue, will be penalized for such misconduct.

5. [*Employer Name*] will conduct a prompt and thorough investigation that ensures due process for all parties, whenever management receives a complaint about sexual harassment, or otherwise knows of possible sexual harassment occurring. [*Employer Name*] will keep the investigation confidential to the extent possible. Effective corrective action will be taken whenever sexual harassment is found to have occurred. All employees, including managers and supervisors, are required to cooperate with any internal investigation of sexual harassment.

6. All employees are encouraged to report any harassment or behaviors that violate this policy. [*Employer Name*] will provide all employees a complaint form for employees to report harassment and file complaints.

7. Managers and supervisors are **required** to report any complaint that they receive, or any harassment that they observe or become aware of, to [*person or office designated*].

8. This policy applies to all employees, paid or unpaid interns, and non-employees and all must follow and uphold this policy. This policy must be provided to all employees and should be posted prominently in all work locations to the extent practicable (for example, in a main office, not an offsite work location) and be provided to employees upon hiring.

What Is "Sexual Harassment"?

Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law. Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

- Such conduct is made either explicitly or implicitly a term or condition of employment; or

- Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

A sexually harassing hostile work environment includes, but is not limited to, words, signs, jokes, pranks, intimidation or physical violence which are of a sexual nature, or which are directed at an

individual because of that individual's sex. Sexual harassment also consists of any unwanted verbal or physical advances, sexually explicit derogatory statements or sexually discriminatory remarks made by someone which are offensive or objectionable to the recipient, which cause the recipient discomfort or humiliation, which interfere with the recipient's job performance.

Sexual harassment also occurs when a person in authority tries to trade job benefits for sexual favors. This can include hiring, promotion, continued employment or any other terms, conditions or privileges of employment. This is also called "quid pro quo" harassment.

Any employee who feels harassed should report so that any violation of this policy can be corrected promptly. Any harassing conduct, even a single incident, can be addressed under this policy.

Examples of sexual harassment

The following describes some of the types of acts that may be unlawful sexual harassment and that are strictly prohibited:

- Physical acts of a sexual nature, such as:
  - Touching, pinching, patting, kissing, hugging, grabbing, brushing against another employee's body or poking another employee's body;
  - Rape, sexual battery, molestation or attempts to commit these assaults.

- Unwanted sexual advances or propositions, such as:
  - Requests for sexual favors accompanied by implied or overt threats concerning the target's job performance evaluation, a promotion or other job benefits or detriments;
  - Subtle or obvious pressure for unwelcome sexual activities.

- Sexually oriented gestures, noises, remarks or jokes, or comments about a person's sexuality or sexual experience, which create a hostile work environment.

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of a particular sex should act or look.

- Sexual or discriminatory displays or publications anywhere in the workplace, such as:
  - Displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic. This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

- Hostile actions taken against an individual because of that individual's sex, sexual orientation, gender identity and the status of being transgender, such as:
  - Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
  - Sabotaging an individual's work;
  - Bullying, yelling, name-calling.

Who can be a target of sexual harassment?

Sexual harassment can occur between any individuals, regardless of their sex or gender. New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace. Harassers can be a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor.

Where can sexual harassment occur?

Unlawful sexual harassment is not limited to the physical workplace itself. It can occur while employees are traveling for business or at employer sponsored events or parties. Calls, texts, emails, and social media usage by employees can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices or during non-work hours.

Retaliation

Unlawful retaliation can be any action that could discourage a worker from coming forward to make or support a sexual harassment claim. Adverse action need not be job-related or occur in the workplace to constitute unlawful retaliation (e.g., threats of physical violence outside of work hours).

Such retaliation is unlawful under federal, state, and (where applicable) local law. The New York State Human Rights Law protects any individual who has engaged in “protected activity.” Protected activity occurs when a person has:

- made a complaint of sexual harassment, either internally or with any anti-discrimination agency;
- testified or assisted in a proceeding involving sexual harassment under the Human Rights Law or other anti-discrimination law;
- opposed sexual harassment by making a verbal or informal complaint to management, or by simply informing a supervisor or manager of harassment;
- reported that another employee has been sexually harassed; or
- encouraged a fellow employee to report harassment.

Even if the alleged harassment does not turn out to rise to the level of a violation of law, the individual is protected from retaliation if the person had a good faith belief that the practices were unlawful. However, the retaliation provision is not intended to protect persons making intentionally false charges of harassment.

Reporting Sexual Harassment

Preventing sexual harassment is everyone's responsibility. [*Employer Name*] cannot prevent or remedy sexual harassment unless it knows about it. Any employee, paid or unpaid intern or non-employee who has been subjected to behavior that may constitute sexual harassment is encouraged to report such behavior to a supervisor, manager or [*person or office designated*]. Anyone who witnesses or becomes aware of potential instances of sexual harassment should report such behavior to a supervisor, manager or [*person or office designated*].

Reports of sexual harassment may be made verbally or in writing. A form for submission of a written complaint is attached to this Policy, and all employees are encouraged to use this complaint form. Employees who are reporting sexual harassment on behalf of other employees should use the complaint form and note that it is on another employee's behalf.

Employees, paid or unpaid interns or non-employees who believe they have been a target of sexual harassment may also seek assistance in other available forums, as explained below in the section on Legal Protections.

Supervisory Responsibilities

All supervisors and managers who receive a complaint or information about suspected sexual harassment, observe what may be sexually harassing behavior or for any reason suspect that sexual harassment is occurring, **are required** to report such suspected sexual harassment to [*person or office designated*].

In addition to being subject to discipline if they engaged in sexually harassing conduct themselves, supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.

Supervisors and managers will also be subject to discipline for engaging in any retaliation.

Complaint and Investigation of Sexual Harassment

All complaints or information about sexual harassment will be investigated, whether that information was reported in verbal or written form. Investigations will be conducted in a timely manner, and will be confidential to the extent possible.

An investigation of any complaint, information or knowledge of suspected sexual harassment will be prompt and thorough, commenced immediately and completed as soon as possible. The investigation will be kept confidential to the extent possible. All persons involved, including complainants, witnesses and alleged harassers will be accorded due process, as outlined below, to protect their rights to a fair and impartial investigation.

Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment. [*Employer Name*] will not tolerate retaliation against employees who file complaints, support another's complaint or participate in an investigation regarding a violation of this policy.

While the process may vary from case to case, investigations should be done in accordance with the following steps:

- Upon receipt of complaint, [*person or office designated*] will conduct an immediate review of the allegations, and take any interim actions (e.g., instructing the respondent to refrain from communications with the complainant), as appropriate. If complaint is verbal, encourage the individual to complete the "Complaint Form" in writing. If he or she refuses, prepare a Complaint Form based on the verbal reporting.

- If documents, emails or phone records are relevant to the investigation, take steps to obtain and preserve them.

- Request and review all relevant documents, including all electronic communications.

- Interview all parties involved, including any relevant witnesses;

- Create a written documentation of the investigation (such as a letter, memo or email), which contains the following:
    - A list of all documents reviewed, along with a detailed summary of relevant documents;
    - A list of names of those interviewed, along with a detailed summary of their statements;
    - A timeline of events;
    - A summary of prior relevant incidents, reported or unreported; and
    - The basis for the decision and final resolution of the complaint, together with any corrective action(s).

- Keep the written documentation and associated documents in a secure and confidential location.

- Promptly notify the individual who reported and the individual(s) about whom the complaint was made of the final determination and implement any corrective actions identified in the written document.

- Inform the individual who reported of the right to file a complaint or charge externally as outlined in the next section.

Legal Protections And External Remedies

Sexual harassment is not only prohibited by [*Employer Name*] but is also prohibited by state, federal, and, where applicable, local law.

Aside from the internal process at [*Employer Name*], employees may also choose to pursue legal remedies with the following governmental entities. While a private attorney is not required to file a complaint with a governmental agency, you may seek the legal advice of an attorney.

In addition to those outlined below, employees in certain industries may have additional legal protections.

State Human Rights Law (HRL)

The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, § 290 et seq., applies to all employers in New York State with regard to sexual harassment, and protects employees, paid or unpaid interns and non-employees, regardless of immigration status. A complaint alleging violation of the Human Rights Law may be filed either with the Division of Human Rights (DHR) or in New York State Supreme Court.

Complaints with DHR may be filed any time **within one year** of the harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL, **within three years** of the alleged sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to [*Employer Name*] does not extend your time to file with DHR or in court. The one year or three years is counted from date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying of monetary damages, attorney's fees and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458. You may call (718) 741-8400 or visit: www.dhr.ny.gov.

Contact DHR at (888) 392-3644 or visit dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

Civil Rights Act of 1964

The United States Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights Act (codified as 42 U.S.C. § 2000e et seq.). An individual can file a complaint with the EEOC anytime within 300 days from the harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint, and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court.

The EEOC does not hold hearings or award relief, but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred. In general, private employers must have at least 15 employees to come within the jurisdiction of the EEOC.

An employee alleging discrimination at work can file a “Charge of Discrimination.” The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (TTY: 1-800-669-6820), visiting their website at www.eeoc.gov or via email at info@eeoc.gov.

If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Protections

Many localities enforce laws protecting individuals from sexual harassment and discrimination. An individual should contact the county, city or town in which they live to find out if such a law exists. For example, employees who work in New York City may file complaints of sexual harassment with the New York City Commission on Human Rights. Contact their main office at Law Enforcement Bureau of the NYC Commission on Human Rights, 40 Rector Street, 10th Floor, New York, New York; call 311 or (212) 306-7450; or visit www.nyc.gov/html/cchr/html/home/home.shtml.

Contact the Local Police Department

If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact the local police department.

Model Complaint Form for Reporting Sexual Harassment

NEW YORK STATE | Combating Sexual Harassment

[Name of employer]

New York State Labor Law requires all employers to adopt a sexual harassment prevention policy that includes a complaint form to report alleged incidents of sexual harassment.

If you believe that you have been subjected to sexual harassment, you are encouraged to complete this form and submit it to [*person or office designated; contact information for designee or office; how the form can be submitted]*. You will not be retaliated against for filing a complaint.

If you are more comfortable reporting verbally or in another manner, your employer should complete this form, provide you with a copy and follow its sexual harassment prevention policy by investigating the claims as outlined at the end of this form.

For additional resources, visit: ny.gov/programs/combating-sexual-harassment-workplace

COMPLAINANT INFORMATION

Name:

Work Address: Work Phone:

Job Title: Email:

Select Preferred Communication Method: ☐Email ☐Phone ☐In person

SUPERVISORY INFORMATION

Immediate Supervisor's Name:

Title:

Work Phone: Work Address:

Adoption of this form does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

COMPLAINT INFORMATION

1. Your complaint of Sexual Harassment is made about:

   Name: Title:

   Work Address: Work Phone:

   Relationship to you: ☐Supervisor ☐Subordinate ☐Co-Worker ☐Other

2. Please describe what happened and how it is affecting you and your work. Please use additional sheets of paper if necessary and attach any relevant documents or evidence.

3. Date(s) sexual harassment occurred:

   Is the sexual harassment continuing? ☐Yes ☐No

4. Please list the name and contact information of any witnesses or individuals who may have information related to your complaint:

The last question is optional, but may help the investigation.

5. Have you previously complained or provided information (verbal or written) about related incidents? If yes, when and to whom did you complain or provide information?

If you have retained legal counsel and would like us to work with them, please provide their contact information.

Signature: _____ *Date:* _____

Instructions for Employers

If you receive a complaint about alleged sexual harassment, follow your sexual harassment prevention policy.

An investigation involves:

- Speaking with the employee
- Speaking with the alleged harasser
- Interviewing witnesses
- Collecting and reviewing any related documents

While the process may vary from case to case, all allegations should be investigated promptly and resolved as quickly as possible. The investigation should be kept confidential to the extent possible.

Document the findings of the investigation and basis for your decision along with any corrective actions taken and notify the employee and the individual(s) against whom the complaint was made. This may be done via email.

New Legislation on Sexual Harassment Will Significantly Affect the Handling of These Cases for Municipalities

Kristin Klein Wheaton

The #MeToo movement and its widespread publicity of issues involving sexual harassment in the workplace have sparked new legislation affecting all employers, including public employers. During his State of the State Address in January, Governor Andrew Cuomo articulated proposed changes to legislation surrounding sexual harassment and prevention in the workplace for public agencies and contractors. The New York State 2018-2019 budget, signed on April 12, 2018, contains provisions and new guidelines that were negotiated into the budget and which affect sexual harassment prevention policies, training and settlements of sexual harassment cases immediately ("Legislation").[1] Not to be left out, the New York City Council, on April 11, 2018, passed a package of legislation referred to as the "Stop Sexual Harassment in NYC Act," described by the City Council as critical to creating safe workplaces in New York City.[2] These pieces of legislation will significantly impact the handling of sexual harassment cases by municipalities.

New York State Legislation

The legislation contained in the New York State budget includes amendments to the New York Executive Law, New York Finance Law, New York Labor Law, New York Civil Practice Law and Rules (CPLR) Law, New York Public Officers Law and New York General Obligations Law relating to the prevention, training and settlement of sexual harassment claims. Significantly, the legislation only applies to "sexual harassment," which is undefined. Earlier versions of the bill contained a definition of sexual harassment, but the definition was left out of the final legislation.

"The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law."

Significantly, individuals who are not employees are protected in the new legislation. The New York Executive Law has been amended to expand the unlawful discriminatory practice of an employer to include sexual harassment of non-employees in its workplace, including contractor, subcontractor, vendor, consultant or any other person providing services pursuant to contract in the workplace, or someone who is an employee of such contractor, subcontractor, vendor, consultant or other person providing service pursuant to a contract in the workplace.[3] Accordingly, all employers, including public entities, will now also need to expend resources investigating complaints made by non-employees in their work-places and take corrective action to the extent that a non-employee is committing harassment against an employee or an employee is harassing a non-employee, or face liability for failure to do so. Fortunately, the legislation provides that in reviewing cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.[4] Other forms of harassment and harassment based upon protected classes, including, but not limited to, race, age or sex discrimination (that is not sexual harassment) are not covered by this legislation.

Kristin Klein Wheaton

Requirements for State Contractors

The legislation imposes new requirements upon contractors that contract with the "state or any public department or agency thereof" where competitive bidding is required.[5] Effective January 1, 2019, each state contractor shall be required to submit a certification with all bids, under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees.[6] The sexual harassment policy and annual training must meet the newly imposed requirements under section 201-g of the New York State Labor Law.[7] Any bid that does not meet this requirement will not be considered. It is in the discretion of the state department or agency to require the certification of contracts for services that are not subject to competitive bidding.[8] In

the event the contractor is unable to make the certification, it must provide a signed statement "which sets forth in detail the reasons therefor."[9]

Requirements for All Employers, Including Municipalities

Effective October 9, 2018, all employers, including municipalities, must adopt the model sexual harassment policy promulgated pursuant to the amended Labor Law that equals or exceeds the standards set forth by the New York State Department of Labor, in consultation with the New York State Division of Human Rights.[10] The model sexual harassment prevention policy shall 1) prohibit sexual harassment consistent with the guidance issued by the Department of Labor and provide examples of prohibited conduct that would constitute unlawful sexual harassment; 2) "include but not be limited to, information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws"; 3) "include a standard complaint form"; 4) "include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties"; 5) inform employees of their rights of redress and all available forums for resolving complaints administratively and judicially (this would include notification about the opportunity to file a complaint with the New York State Division of Human Rights and United States Equal Employment Opportunity Commission); 6) clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as supervisors and managers that knowingly allow such behavior to continue; and 7) "clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful."[11]

In addition, annual interactive training on sexual harassment must be provided by all employers, including municipalities, effective October 9, 2018.[12] The New York State Department of Labor, in consultation with the New York State Division of Human Rights, shall develop a model training program. The legislation provides that the training shall include 1) "an explanation of sexual harassment consistent with guidance issued by the Department [of Labor] in consultation with the Division of Human Rights"; 2) "examples of conduct that would constitute unlawful sexual harassment"; 3) "information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment"; and 4) "information concerning employees' rights of redress and all available forums for adjudicating complaints."[13] In addition, the annual training must address supervisory responsibilities for the prevention of sexual harassment, and address conduct by supervisors that may constitute sexual harassment.[14] Accordingly, the interactive training provided by municipalities must meet or exceed the requirements of the model training and must be provided to employees and supervisors on an annual basis. "Interactive" is not defined in the legislation so it appears to be an open question whether the training needs to be in-person live training or whether online training that has some interactive features will suffice. It appears that recorded training that has no interactive component may be deemed inadequate. The author recommends "live" training or interactive online training, pending further guidance from the Department of Labor.

Reimbursement by Employee Adjudicated to Have Committed Sexual Harassment

Most municipal lawyers have represented municipalities, officers and employees in claims of sexual harassment for years. The law is well established that municipalities are barred from defending and indemnifying employees for acts committed outside of the scope of their employment, for intentional wrongdoing and recklessness on the part of the employee and for punitive damages. The new legislation requires certain employees of municipalities to pay back the municipality for damages awarded in a sexual harassment case.

New York Public Officers Law § 18 has been amended to add a new section 18-a, effective immediately, which provides for reimbursement to the public entity for an award paid owing to an employee who is adjudicated to have committed harassment. Public entities include, but are not limited to, counties, towns, cities, villages, political subdivisions, school districts, BOCES or other governmental entities or entities operating a public school, college, community college or university, a public improvement or special district, public authorities, commissions, agencies or public benefit corporations and any other separate corporate instrumentality of the state.[15] "Employee" is broadly defined to include "commissioner, member of a public board or commission, trustee, director, officer, employee, or any other person holding a position by election, appointment, or employment in the service of the public entity, whether or not compensated" including a former employee or judicially appointed representative.[16] The new section provides that "any employee who has been subject to a final judgment of personal liability for intentional wrongdoing related to a claim of sexual harassment, shall reimburse any public entity

that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment."[17] The tortious employee is required to reimburse the public entity within 90 days of the public entity's payment of the award and if the employee fails to do so, the public entity can garnish the employee's wages.[18] There is an additional amendment to New York Public Officers Law which adds section 17-a containing similar legislation applicable to employees of New York State and its agencies.

Fortunately, language that was in the draft bill which appeared to prohibit even the payment of settlements by municipalities, versus final judgments for sexual harassment cases, did not make it into the final legislation. Notwithstanding, there are questions regarding this new provision that may present practical problems for the municipality's lawyer. Does this language create a conflict of interest for the legal counsel between the duty to represent the municipality and defend the employee? For example, even if the municipality's investigation reveals that the employee acted appropriately, there is always a chance that a final judgment could find that the employee was individually liable (for example as an aider or abettor under the Human Rights Law) if the litigation proceeds to a hearing before an administrative agency or trial. Does the fact that the employee may ultimately have to pay a judgment personally create a conflict of interest in both the strategy of proceeding to trial on a case or deciding to settle, as well as in the defense of a claim? These situations are similar to potential conflicts of interest that arise when a plaintiff institutes a case under 42 U.S.C. § 1983 against a municipality and individual employees and seeks punitive damages against individual public employees. There seems to be a question of whether any disclosure to the employee who is accused of harassment as to the possibility of personal financial responsibility is recommended and/or ethically required. If required, should it be in writing? Should there be any waiver of a potential conflict of interest signed by the employee where the attorney is representing both the municipality and the employee? It will be interesting to see whether this new legislation has any impact on the handling of the defense of these cases.

Confidentiality

Non-disclosure or confidentiality agreements are prohibited in sexual harassment claims, except under limited conditions, effective July 11, 2018. New provisions in the New York General Obligations Law and the CPLR prohibit all employers, including municipalities, from utilizing confidentiality agreements in the settlement or resolution of any claim, "the factual foundation for which involves sexual harassment" unless confidentiality is the complainant's preference.[19] Borrowing from the Age Discrimination in Employment Act, the legislation provides that any such term (of confidentiality) must be provided to all parties and the complainant shall have 21 days to consider the provision, and if he or she agrees to confidentiality, it must be stated in a separately executed written agreement subject to revocation by the complainant within seven days after signing it.[20]

The CPLR has also been amended to add a new section under judgements that prohibits non-disclosure or confidentiality agreements as a condition of discontinuing or settling a case "the factual foundation of which involves sexual harassment" unless confidentiality is the plaintiff's preference.[21] The CPLR has also been amended to include provisions identical to those included in the General Obligations Law, including a 21-day consideration period, and seven-day revocation period, as well as the requirement of an additional written agreement evidencing the preference of the plaintiff to keep the matter confidential.[22]

Bar to Mandatory Arbitration Provision in Cases of Sexual Harassment

Finally, effective July 11, 2018, in limited circumstances, the new legislation bars mandatory arbitration provisions in contracts relating to claims of sexual harassment, except where inconsistent with federal law.[23] A new provision has been added to Article 75 of the CPLR that prohibits mandatory arbitration clauses that require that the parties submit to mandatory arbitration to resolve any allegation of claim of an unlawful discriminatory practice or sexual harassment as a condition of the enforcement of the contract or obtaining remedies under the contract.[24] The legislation does state under "exceptions" that "[n]othing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon."[25] Accordingly, under this legislation, mandatory arbitration clauses are not barred altogether other than in cases of sexual harassment. In the event there is any conflict between a collective bargaining agreement and the legislation, the legislation specifies that the collective bargaining agreement shall control.[26]

Stop Sexual Harassment in New York City Act

The New York City Council also passed a package of 11 bills—together referred to as the Stop Sexual Harassment in NYC Act (the "Act"). These bills are being hailed as the nation's farthest reaching anti-sexual

harassment laws. At the beginning of May, Mayor Bill de Blasio signed the bills into law. The respective bills that make up the Act have different implications for different employers. For example, certain employers will be required to conduct an ongoing assessment of risk factors associated with sexual harassment,[27] report annually on workplace sexual harassment,[28] be evaluated through a climate survey of their employees,[29] display anti-sexual harassment posters at their workplace,[30] and conduct annual anti-sexual harassment training for their employees.[31] The respective bills have various effective dates, some of which are effective immediately. While the legislation seems geared toward private employers, the exact impact on municipalities located in New York City should be followed closely.

Conclusion

While there are still some unanswered questions, what is certain is that there will be more legislation and regulations to come. The state legislation expressly directs issuance of guidance and regulations by the New York State Department of Labor, in consultation with the New York State Division of Human Rights. Some of the criticism of the legislation is that it does not go far enough since it does not cover other types of discrimination beyond sexual harassment. Also, while the proposed budget bill contained very detailed requirements for the conduct of investigations, the final bill does not specifically address what needs to be done in order to have a legally compliant investigation. For now, the case law addressing prompt investigations, as well as the EEOC's recommended best practices for investigations, may be the guidepost.[32] It may be assumed that some of the language in the proposed legislation that did not make it into the final bill may find its way into the regulations and guidance.

Employers may be wondering whether other discrimination claims should be treated similarly with respect to the annual training and development of a written policy. It seems that it may be a matter of time before additional legislation is enacted that applies to other forms of discrimination as well. Given that sexual harassment training and policies are often included in an overall harassment and discrimination prevention program that includes all forms of discrimination, it may make sense for municipalities to apply the same investigation and policy requirements to other forms of discrimination and have one policy that covers all forms of harassment and discrimination. In any event, municipal lawyers everywhere in New York State will be busy the next several months implementing the requirements of this new law.

Endnotes

1. 2018 Sess. Laws of N.Y. Ch. 57 (S.7507-C) (McKinney's 2018).
2. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354940&GUID=EE51AA28-8FAA-41FE-B063-BE965FAED119&Options=ID%7CText%7C&Search=Int+657-A.
3. N.Y. Executive Law § 296-d.
4. *Id.*
5. N.Y. State Finance Law § 139-1(1)(a).
6. *Id.*
7. *Id.*
8. *Id.* at § 139-1(1)(b).
9. *Id.* at § 139-1(3).
10. N.Y. Labor Law § 201-g(1)(b).
11. *Id.* at § 201-g(1)(a).
12. *Id.* at § 201-g(2)(a).
13. *Id.*
14. *Id.* at § 201-g(2)(b).
15. N.Y. Public Officers Law § 18-a(1)(a).
16. *Id.* at § 18-a(1)(b).
17. *Id.* at § 18-a(2).
18. *Id.* at § 18-a(3).
19. N.Y. General Obligations Law § 5-336.
20. *Id.*
21. N.Y. Civil Practice Law and Rules § 5003-b.
22. *Id.*
23. *Id.* at § 7515.
24. *Id.*
25. *Id.* at § 7515(4)(b)(ii).
26. *Id.* at § 7515(4)(c).
27. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354916&GUID=DAE201C7-E082-47C8-9C7F-3CA16D20FA7C&Options=ID%7cText%7c&Search=Harassment.
28. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354934&GUID=A8E7F66B-F56A-44E6-8C9C-4FFB28FD518D&Options=ID|Text|&Search=Harassment.
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30. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354924&GUID=CF950C5F-988C-417F-A720-53451ADA064B&Options=ID|Text|&Search=Harassment.
31. http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354915&GUID=7A944D7E-BD65-490F-96BE-DCC3CFDBFA46&Options=ID|Text|&Search=Harassment; http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3354925&GUID=D9986F4A-C3A9-4299-BAA8-5A1B1A1AD31E&Options=ID|Text|&Search=Harassment.
32. EEOC Checklist for Employers, "Checklist Three: A Harassment Reporting System and Investigations," found at https://www.eeoc.gov/eeoc/task_force/harassment/checklist3.cfm.

Kristin Klein Wheaton, Esq., Partner, Goldberg Segalla LLP

Model Sexual Harassment Prevention Training

OCTOBER 2018 EDITION

NEW YORK STATE | Combating Sexual Harassment

Purpose of this Model Training

New York State is a national leader in the fight against sexual harassment in the workplace and the 2019 Budget includes legislation to further combat it.

Under the new law, every employer in New York State is **now required to establish a sexual harassment prevention policy** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established a model sexual harassment prevention policy for employers to adopt, available at www.ny.gov/programs/combating-sexual-harassment-workplace. Or, employers may adopt a similar policy that meets or exceeds the minimum standards of the model policy.

In addition, every employer in New York State is **now required to provide employees with sexual harassment prevention training** pursuant to Section 201-g of the Labor Law. The Department of Labor in consultation with the Division of Human Rights has established this model training for employers to use. Or, employers may use a training program that meets or exceeds the minimum standards of the model training.

An employer's sexual harassment prevention training **must be interactive**, meaning it requires some level of feedback by those being trained.

The training, which may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation, should include as many of the following elements as possible:

- Ask questions of employees as part of the program;
- Accommodate questions asked by employees, with answers provided in a timely manner;
- Require feedback from employees about the training and the materials presented.

How to Use This Training

This model training is presented in a variety of formats, giving employers maximum flexibility to deliver the training across a variety of worksite settings, while still maintaining a core curriculum.

Available training elements include:

1. **Script** for in-person group training, available in PDF and editable Word formats
2. **PowerPoint** to accompany the script, available online and for download, also in PDF
3. **Video** presentation, viewable online and for download
4. **FAQs**, available online to accompany the training, answering additional questions that arise

Instructions for Employers

- This training is meant to be a model that can be used as is, or adapted to meet the specific needs of each organization.

- Training may include additional interactive activities, including an opening activity, role playing or group discussion.

- If specific employer policies or practices differ from the content in this training, the training should be modified to reflect those nuances, while still including all of the minimum elements required by New York State law (shown on Page 4).

- The training should detail any internal process employees are encouraged to use to complain and include the contact information for the specific name(s) and office(s) with which employees alleging harassment should file their complaints.

- It should also be modified to reflect the work of the organization by including, for example, industry specific scenarios.

- To every extent possible, this training should be given consistently (using the same delivery method) across each organization's workforce to ensure understanding at every level and at every location.

- It is every employer's responsibility to ensure all employees are trained to employer's standards and familiar with the organization's practices.

- All employees must complete initial sexual harassment prevention training before Oct. 9, 2019.

- All employees must complete an additional training at least once per year. This may be based on calendar year, anniversary of each employee's start date or any other date the employer chooses.

- All new employees should complete sexual harassment prevention training as quickly as possible.

- Employers should provide employees with training in the language spoken by their employees. When an employee identifies as a primary language one for which a template training is not available from the State, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a the policy and training in the language spoken by the employee.

- On occasion, a participant may share a personal or confidential experience during the training. If this happens, the trainer should interrupt and recommend the story be discussed privately and with the appropriate office contact. After the training, follow up with this individual to ensure they are aware of the proper reporting steps. Managers and supervisors must report all incidents of harassment.

Minimum Training Standards Checklist

An employer that does not use this model training -- developed by the State Department of Labor and State Division of Human Rights -- must ensure their training meets or exceeds the following minimum standards.

The training **must**:

- ☐ Be interactive;
- ☐ Include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- ☐ Include examples of unlawful sexual harassment;
- ☐ Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to targets of sexual harassment;
- ☐ Include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- ☐ Include information addressing conduct by supervisors and additional responsibilities for supervisors.

NEW YORK STATE

Sexual Harassment Prevention Training

ELEMENT 1: TRAINING SCRIPT

OCTOBER 2018 EDITION

Table of Contents

Trainer Introduction

- Welcome to our annual training on sexual harassment prevention.
- My name is _____[*name*]_____ and I am the _____[*title*]____ at _____[*organization*]_____.
- In recent years, the topic of sexual harassment in the workplace has been brought into the national spotlight, bringing with it renewed awareness about the serious and unacceptable nature of these actions and the severe consequences that follow.
- The term “sexual harassment” may mean different things to different people, depending on your life experience.
- Certain conduct may seem acceptable or have seemed acceptable in the past. That does not mean it is acceptable to the people we work with.
- The purpose of this training is to set forth a common understanding about what is and what is not acceptable in our workplace.

Sexual Harassment in the Workplace

- New York State has long been committed to ensuring that all individuals have an equal opportunity to enjoy a fair, safe and productive work environment.
- Laws and policies help ensure that diversity is respected and that everyone can enjoy the privileges of working in New York State.
- Preventing sexual harassment is critical to our continued success. Sexual harassment will not be tolerated.
- This means any harassing behavior will be investigated and the perpetrator or perpetrators will be told to stop.
- It also means that disciplinary action may be taken, if appropriate. If the behavior is sufficiently serious, disciplinary action may include termination.
- Repeated behavior, especially after an employee has been told to stop, is particularly serious and will be dealt with accordingly.
- This interactive training will help you better understand what is considered sexual harassment.
- It will also show you how to report sexual harassment in our workplace, as well as your options for reporting workplace sexual harassment to external state and federal agencies that enforce anti-discrimination laws.
- These reports will be taken seriously and promptly investigated, with effective remedial action taken where appropriate.

What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination and is unlawful under federal, state, and (where applicable) local law.

- Sexual harassment includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity and the status of being transgender.

- Sexual harassment includes unwelcome conduct which is either of a sexual nature, or which is directed at an individual because of that individual's sex when:

    1. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment, even if the reporting individual is not the intended target of the sexual harassment;

    2. Such conduct is made either explicitly or implicitly a term or condition of employment; or

    3. Submission to or rejection of such conduct is used as the basis for employment decisions affecting an individual's employment.

- There are two main types of sexual harassment.

Hostile Environment

- A hostile environment on the basis of sex may be created by any action previously described, in addition to unwanted words, signs, jokes, pranks, intimidation, physical actions or violence, either of a sexual nature or not of a sexual nature, directed at an individual because of that individual's sex.

- Hostile environment sexual harassment includes:

    - Sexual or discriminatory displays or publications anywhere in the workplace, such as displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials or other materials that are sexually demeaning or pornographic.

        - This includes such sexual displays on workplace computers or cell phones and sharing such displays while in the workplace.

        - This also includes sexually oriented gestures, noises, remarks, jokes or comments about a person's sexuality or sexual experience.

    - Hostile actions taken against an individual because of that individual's sex, such as:

        - Rape, sexual battery, molestation or attempts to commit these assaults.

        - Physical acts of a sexual nature (including, but not limited to, touching, pinching, patting, grabbing, kissing, hugging, brushing against another employee's body or poking another employee's body)

- Interfering with, destroying or damaging a person's workstation, tools or equipment, or otherwise interfering with the individual's ability to perform the job;
- Sabotaging an individual's work;
- Bullying, yelling, name-calling.

Quid Pro Quo Sexual Harassment

- Quid pro quo sexual harassment occurs when a person in authority trades, or tries to trade, job benefits for sexual favors.
- Quid pro quo is a legal term meaning a trade.
- This type of harassment occurs between an employee and someone with authority, like a supervisor, who has the ability to grant or withhold job benefits.
- Quid pro quo sexual harassment includes:
    - Offering or granting better working conditions or opportunities in exchange for a sexual relationship
    - Threatening adverse working conditions (like demotions, shift alterations or work location changes) or denial of opportunities if a sexual relationship is refused
    - Using pressure, threats or physical acts to force a sexual relationship
    - Retaliating for refusing to engage in a sexual relationship

Who can be the Target of Sexual Harassment?

- Sexual harassment can occur between any individuals, regardless of their sex or gender.
- New York Law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace.

Who can be the Perpetrator of Sexual Harassment?

- The perpetrator of sexual harassment can be anyone in the workplace:
- The harasser can be a **coworker** of the recipient
- The harasser can be a **supervisor** or **manager**
- The harasser can be any third-party, including: a **non-employee**, **intern**, **vendor**, **building security**, **client**, **customer** or **visitor**.

Where Can Workplace Sexual Harassment Occur?

- Harassment can occur **whenever and wherever** employees are fulfilling their work responsibilities, including in the field, at any employer-sponsored event, trainings, conferences open to the public and office parties.
- Employee interactions during non-work hours, such as at a hotel while traveling or at events after work can have an impact in the workplace.
- Locations off site and off-hour activities can be considered extensions of the work environment.
- Employees can be the target of sexual harassment through calls, texts, email and social media.
- Harassing behavior that in any way affects the work environment is rightly the concern of management.

Sex Stereotyping

- Sex stereotyping occurs when conduct or personality traits are considered inappropriate simply because they may not conform to other people's ideas or perceptions about how individuals of either sex should act or look.
- Harassing a person because that person does not conform to gender stereotypes as to “appropriate” looks, speech, personality, or lifestyle is sexual harassment.
- Harassment because someone is performing a job that is usually performed, or was performed in the past, mostly by persons of a different sex, is sex discrimination.

Retaliation

- Any employee who has engaged in “protected activity” is protected by law from being retaliated against because of that “protected activity.”

- “Protected activities” with regard to harassment include:

    - Making a complaint to a supervisor, manager or another person designated by your employer to receive complaints about harassment

    - Making a report of suspected harassment, even if you are not the target of the harassment

    - Filing a formal complaint about harassment

    - Opposing discrimination

    - Assisting another employee who is complaining of harassment

    - Providing information during a workplace investigation of harassment, or testifying in connection with a complaint of harassment filed with a government agency or in court

What is Retaliation?

- Retaliation is any action taken to alter an employee’s terms and conditions of employment (such as a demotion or harmful work schedule or location change) because that individual engaged in any of the above protected activities. Such individuals should expect to be free from any negative actions by supervisors, managers or the employer motivated by these protected activities.

- Retaliation can be any such adverse action taken by the employer against the employee, that could have the effect of discouraging a reasonable worker from making a complaint about harassment or discrimination.

- The negative action need not be job-related or occur in the workplace, and may occur after the end of employment, such as an unwarranted negative reference.

What is Not Retaliation

- A negative employment action is not retaliatory merely because it occurs after the employee engages in protected activity.

- Employees continue to be subject to all job requirements and disciplinary rules after having engaged in such activity.

The Supervisor's Responsibility

- Supervisors and managers are held to a high standard of behavior. This is because:
    - They are placed in a position of authority by the employer and must not abuse that authority.
    - Their actions can create liability for the employer without the employer having any opportunity to correct the harassment.
    - They are required to report any harassment that is reported to them or which they observe.
    - They are responsible for any harassment or discrimination that they should have known of with reasonable care and attention to the workplace for which they are responsible.
    - They are expected to model appropriate workplace behavior.

Mandatory Reporting

- Supervisors **must report any harassment** that they observe or know of, even if no one is objecting to the harassment.
- If a supervisor or manager receives a report of harassment, or is otherwise aware of harassment, it must be promptly reported to the employer, without exception,
    - Even if the supervisor or manager thinks the conduct is trivial
    - Even if the harassed individual asks that it not be reported
- Supervisors and managers will be subject to discipline for failing to report suspected sexual harassment or otherwise knowingly allowing sexual harassment to continue.
- Supervisors and managers will also be subject to discipline for engaging in any retaliation.

What Should I Do If I Am Harassed?

- We cannot stop harassment in the workplace unless management knows about the harassment. It is everyone’s responsibility.
- You are encouraged to report harassment to a supervisor, manager or other another person designated by your employer to receive complaints (as outlined in the sexual harassment prevention policy) so the employer can take action.
- Behavior does not need to be a violation of law in order to be in violation of the policy.

- We will provide you with a complaint form to report harassment and file complaints, but if you are more comfortable reporting verbally or in another manner, we are still required to follow the sexual harassment prevention policy by investigating the claims.

- If you believe that you have been subjected to sexual harassment, you are encouraged to complete the Complaint Form and submit it to:

    - [*Person or office designated*]

    - [*Contact information for designee or office*]

    - [*How the Complaint Form can be submitted*]

- You may also make reports verbally.

- Once you submit this form or otherwise report harassment, our organization must follow its sexual harassment prevention policy and investigate any claims.

- You should report any behavior you experience or know about that is inappropriate, as described in this training, without worrying about whether or not if it is unlawful harassment.

- Individuals who report or experience harassment should cooperate with management so a full and fair investigation can be conducted and any necessary corrective action can be taken.

- If you report harassment to a manager or supervisor and receive an inappropriate response, such as being told to “just ignore it,” you may take your complaint to the next level as outlined in our policy under “Legal Protections And External Remedies.”

- Finally, if you are not sure you want to pursue a complaint at the time of potential harassment, document the incident to ensure it stays fresh in your mind.

What Should I Do If I Witness Sexual Harassment?

- Anyone who witnesses or becomes aware of potential instances of sexual harassment should report it to a supervisor, manager or designee.

- It can be uncomfortable and scary, but it is important to tell coworkers "that's not okay" when you are uncomfortable about harassment happening in front of you.

- It is unlawful for an employer to retaliate against you for reporting suspected sexual harassment or assisting in any investigation.

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Investigation and Corrective Action

- Anyone who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action, up to and including termination.
- [*Name of Company*] will investigate all reports of harassment, whether information was reported in verbal or written form.
- An investigation of any complaint should be commenced immediately and completed as soon as possible.
- The investigation will be kept confidential to the extent possible.
- Any employee may be required to cooperate as needed in an investigation of suspected sexual harassment.
    - It is illegal for employees who participate in any investigation to be retaliated against.

Investigation Process

- Our organization also has a duty to take appropriate steps to ensure that harassment will not occur in the future. Here is how we will investigate claims.
- [*Person or office designated*] will conduct an immediate review of the allegations, and take any interim actions, as appropriate
- Relevant documents, emails or phone records will be requested, preserved and obtained.
- Interviews will be conducted with parties involved and witnesses
- Investigation is documented as outlined in the sexual harassment policy
- The individual who complained and the individual(s) accused of sexual harassment are notified of final determination and that appropriate administrative action has been taken.

Additional Protections and Remedies

- In addition to what we've already outlined, employees may also choose to pursue outside legal remedies as suggested below.

New York State Division of Human Rights (DHR)

- A complaint alleging violation of the Human Rights Law may be filed either with DHR or in New York State Supreme Court.
- Complaints may be filed with DHR any time **within one year** of the alleged sexual harassment. You do not need to have an attorney to file.
- If an individual did not file at DHR, they can sue directly in state court under the Human Rights Law, **within three years** of the alleged sexual harassment.
- An individual may not file with DHR if they have already filed a Human Rights Law complaint in state court.
- For more information, visit: **www.dhr.ny.gov**.

United States Equal Employment Opportunity Commission (EEOC)

- An individual can file a complaint with the EEOC anytime **within 300 days** from the alleged sexual harassment. You do not need to have an attorney to file.
- A complaint must be filed with the EEOC before you can file in federal court.
- For more information, visit: **www.eeoc.gov**.
- *NOTE: If an individual files an administrative complaint with DHR, DHR will automatically file the complaint with the EEOC to preserve the right to proceed in federal court.*

Local Protections

- Many localities enforce laws protecting individuals from sexual harassment and discrimination.
- You should contact the county, city or town in which you live to find out if such a law exists.
- Harassment may constitute a crime if it involves things like physical touching, coerced physical confinement or coerced sex acts. **You should also contact the local police department**.

Other Types of Workplace Harassment

- Workplace harassment can be based on other things and is not just about gender or inappropriate sexual behavior in the workplace.
- Any harassment or discrimination based on a protected characteristic is prohibited in the workplace and may lead to disciplinary action against the perpetrator.
    - Protected characteristics include age, race, creed, color, national origin, sexual orientation, military status, sex, disability, marital status, domestic violence victim status, gender identity and criminal history.
- Much of the information presented in this training applies to all types of workplace harassment.

Summary

- After this training, all employees are should understand what we have discussed, including:
    - How to recognize harassment as inappropriate workplace behavior
    - The nature of sexual harassment
    - That harassment because of any protected characteristic is prohibited
    - The reasons why workplace harassment is employment discrimination
    - That all harassment should be reported
    - That supervisors and managers have a special responsibility to report harassment.
- With this knowledge, all employees can achieve appropriate workplace behavior, avoid disciplinary action, know their rights and feel secure that they are entitled to and can work in an atmosphere of respect for all people.
- Find the Complaint Form [*insert information here*].
- For additional information, visit: **ny.gov/programs/combating-sexual-harassment-workplace**

Sexual Harassment Case Studies

- Let’s take a look at a few scenarios that help explain the kind of behaviors that can constitute sexual harassment.

- These examples describe inappropriate behavior in the workplace that will be dealt with by corrective action, including disciplinary action.

- Remember, it is up to **all employees** to report inappropriate behavior in the workplace.

Example 1: Not Taking “No” for an Answer

Li Yan's coworker Ralph has just been through a divorce. He drops comments on a few occasions that he is lonely and needs to find a new girlfriend. Li Yan and Ralph have been friendly in the past and have had lunch together in local restaurants on many occasions. Ralph asks Li Yan to go on a date with him—dinner and a movie. Li Yan likes Ralph and agrees to go out with him. She enjoys her date with Ralph but decides that a relationship is not a good idea. She thanks Ralph for a nice time, but explains that she does not want to have a relationship with him. Ralph waits two weeks and then starts pressuring Li Yan for more dates. She refuses, but Ralph does not stop. He keeps asking her to go out with him.

Question 1. When Ralph first asked Li Yan for a date, this was sexual harassment. True or False?

FALSE: Ralph's initial comments about looking for a girlfriend and asking Li Yan, a coworker, for a date are not sexual harassment. Even if Li Yan had turned Ralph down for the first date, Ralph had done nothing wrong by asking for a date and by making occasional comments that are not sexually explicit about his personal life.

Question 2. Li Yan cannot complain of sexual harassment because she went on a date with Ralph. True or False?

FALSE: Being friendly, going on a date, or even having a prior relationship with a coworker does not mean that a coworker has a right to behave as Ralph did toward Li Yan. She has to continue working with Ralph, and he must respect her wishes and not engage in behavior that has now become inappropriate for the workplace.

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Li Yan complains to her supervisor, and the supervisor (as required) reports her complaint to the person designated by her employer to receive complaints. Ralph is questioned about his behavior and he apologizes. He is instructed by the designated person to stop. Ralph stops for a while but then starts leaving little gifts for Li Yan on her desk with accompanying love notes. The love notes are not overtly offensive, but Ralph's behavior is starting to make Li Yan nervous, as she is afraid he may start stalking her.

Question 3. Ralph's subsequent behavior with gifts and love notes is not sexual harassment because he has stopped asking Li Yan for dates as instructed. He is just being nice to Li Yan because he likes her. True or False?

FALSE: Li Yan should report Ralph's behavior. She was entitled to have effective assistance in getting Ralph to stop his inappropriate workplace behavior. Because Ralph has returned to pestering Li Yan after being told to stop, he could be subject to serious disciplinary action for his behavior.

Example 2: The Boss with a Bad Attitude

Sharon transfers to a new location with her employer. Her new supervisor, Paul, is friendly and helps her get familiar with her new job duties. After a few days, when no one else is around, Paul comes over to Sharon's work area to chat. Paul talks about what he did last night, which was to go to a strip club. Sharon is shocked that Paul would bring up such a topic in the workplace and says nothing in response. Paul continues talking and says that all the women in the office are so unattractive that he needs to get out and “see some hot chicks” once in a while. He tells Sharon he is glad she joined the staff because, unlike the others, she is “easy on the eyes.” Sharon feels very offended and demeaned that she and the other women in her workplace are being evaluated on their looks by their supervisor.

Question 1. Because Paul did not tell Sharon that she is unattractive, he has not harassed her. True or False?

FALSE: Paul has made sexually explicit statements to Sharon, which are derogatory and demeaning to Sharon and her female coworkers. It does not matter that Paul supposedly paid Sharon a “compliment.” The discussion is still highly offensive to Sharon, as it would be to most reasonable persons in her situation.

Question 2. By bringing up his visit to the strip club, Paul is engaging in inappropriate workplace behavior. True or False?

TRUE: Simply bringing up the visit to the strip club is inappropriate in the workplace, especially by a supervisor, and it would be appropriate for Sharon to report this conduct. A one-time comment about going to a strip club is behavior that Paul would be told to stop, even though it probably would not rise to the level of unlawful harassment, unless it was repeated on multiple occasions.

Question 3. Paul should be instructed to stop making these types of comments, but this is not a serious matter. True or False?

FALSE: Paul's comments about the female employees are a serious matter and show his contempt for women in the workplace. Paul is required to model appropriate behavior, and must not exhibit contempt for employees on the basis of sex or any protected characteristic. Sharon should not have to continue to work for someone she knows harbors such contempt for women, nor should the other employees have to work for such a supervisor. Management should be aware of this, even if the other employees are not, and Paul should be disciplined and, most likely, removed from his current position.

Example 3: No Job for a Woman?

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Carla often hears comments like “Watch out, here she comes–that crazy woman driver!” in a joking manner. Also, someone keeps putting a handmade sign on the only port-a-potty at the worksite that says, “Men only.”

Question 1. Women in traditionally male jobs should expect teasing and should not take the joking comments too seriously. True or False?

FALSE: Whether Carla is being harassed depends in part on Carla's opinion of the situation; that is, whether she finds the behavior offensive. However, if at any point Carla does feel harassed, she is entitled to complain of the behavior and have it stopped, regardless of whether and for how long she has endured the behavior without complaint. Carla can always say when enough is enough.

Question 2. Carla cannot complain, because the site supervisor sometimes joins in with the joking behavior, so she has nowhere to go. True or False?

FALSE: Carla can still complain to the supervisor who is then on notice that the behavior bothers Carla and must be stopped. The supervisor's failure to take Carla's complaint seriously, constitutes serious misconduct on his or her part. Carla can also complain directly to the person designated by her employer to receive complaints, either instead of going to the supervisor, or after doing so. The employer is responsible for assuring that all employees are aware of its anti-harassment policies and procedures.

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Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, “You're taking a job away from a man who deserves it,” “You should be home with your kids,” and “What kind of a mother are you?” Also, someone scratched the word “bitch” on Carla's toolbox.

Question 3. These behaviors, while rude, are not sexual harassment because they are not sexual in nature. True or False?

FALSE: The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.

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Carla complains about the jokes and other behaviors, and an investigation is conducted. It cannot be determined who defaced Carla's toolbox. Her coworkers are told to stop their behavior or face disciplinary charges. The supervisor speaks with Carla and tells her to come to him immediately if she has any further problems. Carla then finds that someone has urinated in her toolbox.

Question 4. There is nothing Carla can do because she can't prove who vandalized her toolbox. True or False?

FALSE: Carla should speak to her supervisor immediately, or contact any other person designated by her employer to receive complaints directly. Although the situation has become very difficult, it is the employer's responsibility to support Carla and seek a solution. An appropriate investigation must be promptly undertaken and appropriate remedial action must follow.

Example 4: Too Close for Comfort

Keisha has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but she doesn't seem to get the message.

Question 1. Keisha should just ignore Sarah's behavior. True or False?

FALSE: If Keisha is uncomfortable with Sarah's behavior, she has options. If she feels comfortable doing so, she should tell Sarah to please back off because her closeness and touching make her uncomfortable. Another option is to complain directly to a person designated by her employer to receive complaints, who will speak with Sarah. Although this may not be sufficiently severe or pervasive to create an unlawful harassment situation (unless it was repeated by Sarah after she was told to stop), there is no reason for Keisha to be uncomfortable in the workplace. There is no valid reason for Sarah to engage in this behavior.

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Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. She is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's breast.

Question 2. Sarah's brushing up against Keisha in the conference room could just be inadvertent and does not give Keisha any additional grounds to complain about Sarah. True or False?

FALSE: Sarah is now engaging in a pattern of escalating behavior. Given the pattern of her "too close" and "touching" behavior, it is unlikely that this was inadvertent. Even before being "trapped" in Sarah's office, Keisha should have reported all of the behaviors she had experienced that had made her uncomfortable.

Question 3. Sarah touching Keisha's breast is inappropriate but is probably not unlawful harassment because it only happened once. True or False?

FALSE: Any type of sexual touching is very serious and does not need to be repeated to constitute sexual harassment. Keisha should immediately report it without waiting for it to be repeated. Sarah can expect to receive formal discipline, including possible firing.

Example 5: A Distasteful Trade

The following scenario will explain many aspects of quid pro quo sexual harassment.

Tatiana is hoping for a promotion to a position that she knows will become vacant soon. She knows that her boss, David, will be involved in deciding who will be promoted. She tells David that she will be applying for the position, and that she is very interested in receiving the promotion. David says, “We'll see. There will be a lot of others interested in the position.”

A week later, Tatiana and David travel together on state business, including an overnight hotel stay. Over dinner, David tells Tatiana that he hopes he will be able to promote her, because he has always really enjoyed working with her. He tells her that some other candidates “look better on paper” but that she is the one he wants. He tells her that he can “pull some strings” to get her into the job and Tatiana thanks David. Later David suggests that they go to his hotel room for “drinks and some relaxation.” Tatiana declines his “offer.”

Question 1. David's behavior could be harassment of Tatiana. True or False?

TRUE: David's behavior as Tatiana's boss is inappropriate, and Tatiana should feel free to report the behavior if it made her uncomfortable. It is irrelevant that this behavior occurs away from the workplace. Their relationship is that of supervisor and supervisee, and all their interactions will tend to impact the workplace.

David's behavior, at this point, may or may not constitute quid pro quo harassment; David has made no threat that if Tatiana refuses his advance he will handle her promotion any differently. However, his offer to “pull some strings” followed by a request that they go to his hotel room for drinks and relaxation might be considered potentially coercive. Certainly, if David persists in his advances—even if he never makes or carries out any threat or promise about job benefits—then this could create a hostile environment for Tatiana, for which the employer could be strictly liable because David is a management employee.

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After they return from the trip, Tatiana asks David if he knows when the job will be posted so that she can apply. He says that he is not sure, but there is still time for her to “make it worth his while” to pull strings for her. He then asks, “How about going out to dinner this Friday and then coming over to my place?”

Question 2. David engaged in sexual harassment. True or False?

TRUE: It is now evident that David has offered to help Tatiana with her promotion in exchange for sexual favors.

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Tatiana, who really wants the position, decides to go out with David. Almost every Friday they go out at David's insistence and engage in sexual activity. Tatiana does not want to be in a relationship with David and is only going out with him because she believes that he will otherwise block her promotion.

Question 3. Tatiana cannot complain of harassment because she voluntarily engaged in sexual activity with David. True or False?

FALSE: Because the sexual activity is unwelcome to Tatiana, she is a target of sexual harassment. Equally, if she had refused David's advances, she would still be a target of sexual harassment. The offer to Tatiana to trade job benefits for sexual favors by someone with authority over her in the workplace is quid pro quo sexual harassment, and the employer is exposed to liability because of its supervisor's actions.

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Tatiana receives the promotion.

Question 4. Tatiana cannot complain of harassment because she got the job, so there is no discrimination against her. True or False?

FALSE: Tatiana can be the recipient of sexual harassment whether or not she receives the benefit that was used as an inducement.

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Tatiana breaks off the sexual activities with David. He then gives her a bad evaluation, and she is removed from her new position at the end of the probationary period and returns to her old job.

Question 5. It is now “too late” for Tatiana to complain. Losing a place of favor due to the break up of the voluntary relationship does not create a claim for sexual harassment. True or False?

FALSE: It is true that the breakup of a relationship, if truly consensual and welcomed at the time, usually does not create a claim for sexual harassment. However, the “relationship” in this case was never welcomed by Tatiana. David's behavior has at all times been inappropriate and a serious violation of the employer’s policy. As the person who abused the power and authority of a management position, David has engaged in sexual harassment.

Example 6: An Issue about Appearances

Leonard works as a clerk typist for a large employer. He likes to wear jewelry, and his attire frequently includes earrings and necklaces. His boss, Margaret, thinks it's “weird” that, as a man, Leonard wears jewelry and wants to be a clerical worker. She frequently makes sarcastic comments to him about his appearance and refers to him “jokingly” as her office boy. Leonard, who hopes to develop his career in the area of customer relations, applies for an open promotional position that would involve working in a “front desk” area, where he would interact with the public. Margaret tells Leonard that if he wants that job, he had better look “more normal” or else wait for a promotion to mailroom supervisor.

Question 1. Leonard's boss is correct to tell him wearing jewelry is inappropriate for customer service positions. True or False?

FALSE: Leonard's jewelry is only an issue because Margaret considers it unusual for a man to wear such jewelry. Therefore, her comments to Leonard constitute sex stereotyping.

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Margaret also is “suspicious” that Leonard is gay, which she says she “doesn't mind,” but she thinks Leonard is “secretive.” She starts asking him questions about his private life, such as “Are you married?” “Do you have a partner?” ”Do you have kids?” Leonard tries to respond politely “No” to all her questions but is becoming annoyed. Margaret starts gossiping with Leonard's coworkers about his supposed sexual orientation.

Question 2. Leonard is the recipient of harassment on the basis of sex and sexual orientation. True or False?

TRUE: Leonard is harassed on the basis of sex because he is being harassed for failure to adhere to Margaret's sex stereotypes.

Leonard is also harassed on the basis of his perceived sexual orientation. It does not matter whether or not Leonard is a gay man in order for him to have a claim for sexual orientation harassment.

Leonard might also be considered a target of harassment on the basis of gender identity, which is a form of sex and/or disability discrimination prohibited by the Human Rights Law. Leonard should report Margaret's conduct, which is clearly a violation of the sexual harassment policy, to a person designated by his employer to receive complaints (i.e. his employer’s “designee”).

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Leonard decides that he is not going to get a fair chance at the promotion under these circumstances, and he complains to the employer's designee about Margaret's behavior. The designee does an investigation and tells Margaret that Leonard's jewelry is not in violation of any workplace rule, that she is to consider him for the position without regard for his gender, and that she must stop making harassing comments, asking Leonard intrusive questions, and gossiping about his personal life. Margaret stops her comments, questions, and gossiping, but she then recommends a woman be promoted to the open position. The woman promoted has much less experience than Leonard and lacks his two-year degree in customer relations from a community college.

Question 3. Leonard has likely been the target of discrimination on the basis of sex, sexual orientation and/or retaliation. True or False?

TRUE: We don't know Margaret's reason for not recommending Leonard for the promotion, but it is not looking good for Margaret. It appears that she is either biased against Leonard for the same reasons she harassed him, or she is retaliating because he complained, or both.

Leonard should speak further with the employer’s designee, and the circumstances of the promotion should be investigated. If it is found that Margaret had abused her supervisory authority by failing to fairly consider Leonard for the promotion, she should be subject to disciplinary action. This scenario shows that sometimes more severe action is needed in response to harassment complaints, in order to prevent discrimination in the future.

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STOP SEXUAL HARASSMENT ACT FACTSHEET

All employers are required to provide written notice of employees' rights under the Human Rights Law both in the form of a displayed poster **and** as an information sheet distributed to individual employees at the time of hire. This document satisfies the information sheet requirement.

The NYC Human Rights Law

The NYC Human Rights Law, one of the strongest anti-discrimination laws in the nation, protects all individuals against discrimination based on gender, which includes sexual harassment in the workplace, in housing, and in public accommodations like stores and restaurants. Violators can be held accountable with civil penalties of up to $250,000 in the case of a willful violation. The Commission can also assess emotional distress damages and other remedies to the victim, can require the violator to undergo training, and can mandate other remedies such as community service.

Sexual Harassment Under the Law

Sexual harassment, a form of gender-based discrimination, is unwelcome verbal or physical behavior based on a person's gender.

Some Examples of Sexual Harassment

- unwelcome or inappropriate touching of employees or customers
- threatening or engaging in adverse action after someone refuses a sexual advance
- making lewd or sexual comments about an individual's appearance, body, or style of dress
- conditioning promotions or other opportunities on sexual favors
- displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.
- making sexist remarks or derogatory comments based on gender

Retaliation Is Prohibited Under the Law

It is a violation of the law for an employer to take action against you because you oppose or speak out against sexual harassment in the workplace. The NYC Human Rights Law prohibits employers from retaliating or discriminating "in any manner against any person" because that person opposed an unlawful discriminatory practice. Retaliation can manifest through direct actions, such as demotions or terminations, or more subtle behavior, such as an increased work load or being transferred to a less desirable location. The NYC Human Rights Law protects individuals against retaliation who have a good faith belief that their employer's conduct is illegal, even if it turns out that they were mistaken.

Report Sexual Harassment

If you have witnessed or experienced sexual harassment inform a manager, the equal employment opportunity officer at your workplace, or human resources as soon as possible.

Report sexual harassment to the NYC Commission on Human Rights. Call 718–722–3131 or visit NYC.gov/HumanRights to learn how to file a complaint or report discrimination. You can file a complaint anonymously.

State and Federal Government Resources

Sexual harassment is also unlawful under state and federal law where statutes of limitations vary.

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NYC Commission on Human Rights

BILL DE BLASIO
Mayor

CARMELYN P. MALALIS
Commissioner/Chair

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NYC Commission on Human Rights

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Mayor

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Commissioner/Chair

GOLDBERG SEGALLA

EMPLOYMENT AND LABOR

Goldberg Segalla Will Help You Meet the 2018 New York Anti-Sexual Harassment Requirements and Build a Stronger Workplace Environment

Earlier this year, New York State and City passed major legislation to address and prevent sexual harassment in the workplace. Among these new measures are requirements to update employer policies and procedures as well as to enact annual anti-sexual harassment training for employees. Several of the deadlines are fast-approaching, including one to implement a compliant anti-harassment policy by October 9.

Are you ready? Following our commitment to advancing the education of our clients, Goldberg Segalla will teach you how to comply with the new laws and help you develop a healthier company culture for all employees.

Goldberg Segalla is a one-stop shop for efficiently managing risk:

1. Our team of highly experienced Employment and Labor attorneys will review and update your anti-sexual harassment policies, procedures, and strategies to help ensure that your business meets the new requirements — all for a flat fee.
2. We'll help you develop anti-sexual harassment training that is customized for your business and compliant with New York law, again for a convenient flat fee.
3. We'll administer your business's customized training to your employees, utilizing a hybrid flat fee/discounted hourly rate plan for maximum value.

At Goldberg Segalla, we take our commitment to client service very seriously. Our attorneys draw from a wealth of experience handling all manner of employment and labor issues to help you meet and exceed the new legal obligations. As with all of our practice philosophies, we're dedicated to bringing you into compliance with these laws by finding a unique approach that makes sense for your business.

To learn how our teams can work together, contact:

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Speaker Biographies

ADOLPHO BIRCH, ESQ.

Biography

Adolpho Birch serves as Senior Vice President of Labor Policy & League Affairs for the National Football League, which is headquartered in New York, New York. Upon joining the NFL in 1997, his primary responsibility was the enforcement of the League's Collective Bargaining Agreement, which encompassed issues including player and Club contract and injury grievances, benefits matters and salary cap disputes. In his current capacity, he oversees the development, administration and enforcement of the League's critical policies respecting the integrity of the game, including those on substances of abuse, performance-enhancing drugs, gambling and criminal misconduct. Mr. Birch also has advanced the League's legislative and political interests, working with federal, state and local officials on key league issues such as youth concussion laws, the league's tax status and the FCC's blackout rule. He also previously directed the League's player development efforts, which comprise a number of programs designed to support player and employee off-field success, focusing on continuing education, financial education, career development and clinical assistance.

Prior to joining the NFL, Mr. Birch was in private practice in Houston, Texas, initially with Fulbright & Jaworski's Antitrust/Complex Litigation and Public Law group; and later with a boutique firm specializing in labor, insurance defense and municipal finance. Preceding his firm affiliations, he served as judicial law clerk to the Honorable Thomas A. Wiseman, Jr., Chief Judge of the U.S. District Court for the Middle District of Tennessee.

Mr. Birch attended Vanderbilt University Law School as a Patricia Roberts Harris Scholar, serving on the Editorial Board of the Vanderbilt Law Review and earning his juris doctorate in 1991. He did his undergraduate work at Harvard University, where he graduated with honors in Government and participated as a member of the junior varsity lacrosse and basketball teams, Kappa Alpha Psi Fraternity Inc. and other student organizations.

Mr. Birch was raised in Nashville and is actively involved in a number of professional and philanthropic organizations including the Sports Lawyers Association (Board Member), Partnership for Clean Competition (Board of Governors), Why Not Sports? (Board Member), New York City Business of Sports High School (Advisory Board Member) and the National Bar Association. In October 2010, Mr. Birch was chosen as one of the top 100 leaders of the African-American community by The Root, a media collaboration between scholar Henry Louis Gates, Jr. and the Washington Post. In May 2014, he was named a Trustee to the Vanderbilt University Board of Trust.

BENJAMIN BRAFMAN, ESQ.

Biography

Benjamin Brafman is the principal of a seven-lawyer firm Brafman & Associates, P.C., located in Manhattan. Mr. Brafman's firm specializes in criminal law with an emphasis on White Collar criminal defense.

Mr. Brafman, is a former Assistant District Attorney in the Rackets Bureau of the New York County District Attorney's Office, and has been in private practice since 1980. He is a Fellow in the American College of Trial Lawyers and in 1997, was selected by New York Magazine as the "Best Criminal Defense Lawyer in New York." He was the recipient of the "Outstanding Private Criminal Defense Practitioner Award" for 2005 from the New York State Bar Association, and in March 2006 Mr. Brafman received the Norman Ostrow Award for outstanding achievement in the field of White Collar Criminal Defense by the New York Council of Defense Lawyers. In January 2007, Mr. Brafman was presented with the "first" ever Clarence Darrow Award for Distinguished Practitioner by the New York State Association of Criminal Defense Lawyers. In March 2014, he also received the Robert M. Morgenthau Award from the Police Athletic League for outstanding achievements in the field of Criminal Defense, and most recently, Mr. Brafman was awarded the Pursuit of Justice Award from The American Association of Jewish Lawyers and Jurists. Mr. Brafman has represented a wide range of high-profile celebrities, business leaders, lawyers and professionals in major criminal cases throughout the United States, Israel and Europe. Mr. Brafman's acquittal record in complex criminal trials is among the highest in New York City and he lectures widely throughout the United States on issues related to trial advocacy.

GREGORY S. CHIARELLO, ESQ.

Biography

GREGORY S. CHIARELLO is a partner at Outten & Golden LLP in New York. He is Co-chair of the Family Responsibilities & Disabilities Discrimination Practice Group and a member of the Sex Discrimination and Sexual Harassment Practice Group. Mr. Chiarello represents employees in a variety of employment matters, including discrimination, retaliation, and harassment claims; fair pay and equal pay claims; breach of employment and other contracts; and noncompete and other restrictive covenant issues. While Mr. Chiarello's background is as a litigator, he frequently counsels employees on a variety of legal and non-legal issues, including preparing employees facing internal and external investigations.

Mr. Chiarello is Co-chair of the Labor Relations and Employment Law Committee of the New York County Lawyers Association, and an active member of the American Bar Association, and the National Employment Lawyers Association (NELA) and its New York Affiliate (NELA/NY).

Rick Collins, Esq., CSCS

Biography

Rick Collins is a principal in the law firm of Collins Gann McCloskey & Barry [www.cgmbesq.com], with main offices on Long Island. He is a former prosecutor in the Office of the Nassau County District Attorney, and has been practicing criminal defense since 1990. He has served as a faculty member in dozens of trial practice courses. Currently the Vice-President of the Nassau County Bar Association, he also sits on the Executive Committee of the New York State Bar Association Criminal Justice Section and is Co-Chair of its Sealing Committee. He is internationally recognized as a legal authority on performance-enhancing drugs and substances, and has a nationwide practice focusing on the strength, health and sports communities. He has testified in federal court as an expert witness and also before the U.S. Sentencing Commission. He received his undergraduate degree from Hofstra University, Hempstead, NY, and his law degree from Hofstra School of Law, where he attended on a full academic scholarship and served on the *Law Review*. He was admitted to the New York Bar in 1985 and is also admitted to practice in Massachusetts, Pennsylvania, Texas, the District of Columbia, and numerous federal courts.

ERIQ GARDNER

Biography

Eriq Gardner is a senior editor at The Hollywood Reporter. He is primarily responsible for THR, ESQ, an award-winning blog which provides breaking news and cutting edge analysis of pertinent topics in media law. A graduate of the Medill School of Journalism at Northwestern University, Gardner has also written for Bloomberg, Slate, New York Magazine and elsewhere, plus worked as a digital consultant for a national cable news network.

KALPANA KOTAGAL, ESQ.

Biography

Kalpana Kotagal is a Partner at Cohen Milstein, a member of the firm's Civil Rights & Employment practice group, and Chair of the firm's Hiring and Diversity Committee. Ms. Kotagal plays an active role in the investigation and development of new matters for the Civil Rights & Employment practice group.

Ms. Kotagal is co-author of the "Inclusion Rider," referenced by Oscar-winning actress Frances McDormand in her 2018 Best Actress acceptance speech. Ms. Kotagal is working on this project in collaboration with Dr. Stacy Smith of the Annenberg Inclusion Initiative and Fanshen Cox DiGiovanni of Pearl Street Films. Together they are working to help transform the hiring practices in the film and television industry. Ms. Kotagal is also currently serving as an advisor to noted filmmakers on a film addressing issues of gender pay disparities.

A noted public speaker, Ms. Kotagal is often called on to address issues of employment and civil rights law, class actions, mandatory arbitration, diversity in the workplace. She also speaks regularly to law students and new lawyers.

Currently, Ms. Kotagal represents female sales employees in a Title VII and Equal Pay Act case against one of the nation's largest jewelry chains in Jock, et al. v Sterling Jewelers Inc. Her clients have alleged a pattern of sex discrimination in compensation and promotions. Ms. Kotagal also represents former female sales employees in a putative class action against AT&T, alleging violations of the Title VII, the Americans with Disabilities Act and the Family Medical Leave Act in Hills, et al. v. AT&T Mobility Services LLC, as well as transgender beneficiaries of federal health insurance who have challenged the denial of transition-related care as discriminatory.

Among other notable cases, Ms. Kotagal played an instrumental role in representing Wal-Mart employees in the landmark Supreme Court case, Dukes v. Wal-Mart Stores Inc., a case addressing the standards for class certification.

Practice Areas

- Civil Rights & Employment

Admissions

- District of Columbia
- New York

Education

- University of Pennsylvania, J.D., cum laude, 2005
- Stanford University, B.S., with Honors, 1999

BRIAN MALKIN, ESQ.

Biography

Brian is Chair of NYSBA's Food, Drug and Cosmetic Section and Co-Chair and founder of NYSBA's new Committee on Cannabis Law. Brian is an attorney in Arent Fox's FDA, Intellectual Property, and Health Care Groups. He has more than 23 years of food and drug law practice and over 12 years of intellectual property law practice. In particular, his practice includes the interrelation between patent law and food and drug law. Brian's regulatory experience includes all types of FDA-regulated products: drugs (including animal drugs), biologics, medical devices, foods and dietary supplements, tobacco products, and cosmetics. Brian's intellectual property experience includes FDA and patent litigation for both innovator and generic companies. Brian began his legal career as a regulatory counsel at the U.S. Food and Drug Administration, where he worked for more than nine years in both the Office of the Commissioner and the Center for Drug Evaluation and Research. At FDA he focused on new product evaluations, compliance issues related to clinical investigations and intellectual property (e.g., patent term restoration). Brian's work resulted in new product approvals as well as new industry guidance documents and policies, such as the animal efficacy rule for counter-terrorism products. Following several years of practice in an FDA law firm, Brian recognized an unmet need to understand both food and drug and intellectual property law for life cycle management and diligence, particularly concerning products affected by the Hatch-Waxman Act such as generic and 505(b)(2) new drug applications. As a result, Brian returned to university to obtain a Bachelor of Science degree in biochemistry. Prior to joining Arent Fox, Brian practiced for more than nine years at an intellectual property law firm, where he worked on a variety of new product evaluations, FDA and patent litigations, due diligence projects, patent prosecutions, and licensing and commercial transactions and has also led an FDA Group at an international law firm for nearly three years.

JONATHAN MANFRE, ESQ.

Biography

Jonathan Manfre, (Jay), is an associate attorney at Collins Gann McCloskey & Barry PLLC. He graduated from New York Law School in June 2015. Jay joined CGMB in August 2017, and handles the daily needs of the firms dietary supplement, sport nutrition and conventional food clients. Jay has become an expert in the FDA and FTC regulations that apply to these industries. He has also become well versed in the legal and regulatory landscape of Cannabidiol (CBD). He regularly reviews clients' labels, websites and marketing for compliance. In addition to serving the daily needs of clients, Jay has been published in Natural Products Insider and serves as a member of the Nassau County Bar Association's New Lawyer's Section and the New York State Bar Association's Food Drug and Cosmetic Law Section.

While at New York Law School, he served as a member of the *New York Law School Law Review*. In addition, he was a John Marshall Harlan Scholar, an Affiliate for the Center for Business and Financial Law, a member of the Dean's Leadership Counsel, and a staff writer for the Center for New York City Law. Prior to joining Collins Gann McCloskey & Barry PLLC, Jay was an Associate at Suris & Associates, PC in Melville. At Suris & Associates he was responsible for handling all aspects of Personal Injury matters from the start of the case through litigation, including discovery, depositions, and motion practice.

If you have a legal matter or question surrounding dietary supplement law/FDA Law, or are faced with an FDA Warning Letter or possible supplement recall, you need experienced counsel, straight answers and prompt attention. Call the dietary supplement lawyers of Collins Gann McCloskey & Barry PLLC., at 516-294-0300 today to discuss how we can help in all aspects of dietary supplement law. We may be reached via facsimile at 516-294-0477 or by email at info@supplementcounsel.com.

CAMERON MYLER, ESQ.

Biography

Cameron Myler's professional experiences are diverse, but there's a common theme: sport. She is a Clinical Assistant Professor at New York University's Tisch Institute of Global Sport, an arbitrator with the Court of Arbitration for Sport, an intellectual property and sports lawyer, and a four-time Olympian in the sport of luge.

At NYU, Cameron's teaching and research interests include legal issues relating to Olympic sport, international sports governance, the regulation of doping in sport, intellectual property, as well as athletes' commercial rights, branding and career transitions. She frequently speaks at conferences and has guest lectured around the world, including in Olympia, Greece at the International Olympic Academy's Postgraduate Seminar on Olympic Studies, in Switzerland at the University of Lausanne, and in Tokyo, Japan at Keio University's Sports Leadership Program in the Graduate School of System Design and Management.

Cameron is a member of the Court of Arbitration for Sport, which adjudicates eligibility, doping, ethics and commercial issues related to sport. She served on the Anti-Doping Division of CAS at the Winter Olympic Games in PyeongChang, South Korea. In her legal practice, she has represented Olympic athletes and sports organizations, advised media and entertainment clients in a variety of commercial matters, and litigated high-profile intellectual property cases.

Prior to practicing law, Cameron competed in four Olympic Games in the sport of luge (1988 – Calgary, 1992 – Albertville, 1994 – Lillehammer, 1998 – Nagano), and was elected by her teammates to carry the American flag at the Opening Ceremonies of the Olympics in Norway. She was U.S. National Champion seven times and won 11 World Cup medals. Cameron was inducted into the Hall of Fame of the National Association for Sport & Physical Education and is featured in the book *SuperWomen: 100 Women --- 100 Sports*. She is a two-time grant recipient of the Women's Sports Foundation Training and Travel Fund.

Cameron also has extensive experience in the governance of Olympic sport: she served on the U.S. Olympic Committee for eight years, including on the Board of Directors, Athletes' Advisory Council, Legislation Committee, Government Relations and Planning Committee, and the Athlete Support Committee. She was appointed to the USOC's Ethics and Governance Task Force that developed and led the implementation of changes to the organization's governance structure, and testified before Congress on behalf of the Task Force. She currently serves as the Chairperson of the Audit and Ethics Committee of USA Luge, the National Governing Body for the sport in the United States.

She is committed to using sport to promote development and social change. Cameron is an Athlete Ambassador for Kids Play International, a nonprofit that uses sport to promote gender equity in countries impacted by genocide, and an Olympic Ambassador for Athlete Ally, which advocates for inclusion of the LGBTQ community in sports. She also supports Champions for America's Future, a nonprofit organization that promotes policy solutions for at-risk kids to compete in life.

Cameron graduated from Dartmouth College *cum laude* and, after retiring from competitive sport, received her J.D. from Boston College Law School and an Executive Masters in Sports Organization Management from the University of Poitiers, a program coordinated by the IOC.

BILL ORDOWER, ESQ.

Biography

Bill Ordower is the Executive Vice President and General Counsel for Major League Soccer (MLS) and Soccer United Marketing (SUM). He also serves as Secretary of the MLS Board of Governors.

Ordower oversees the legal affairs for MLS and SUM, including corporate governance, litigation, expansion, investigations, player matters, intellectual property and all commercial transactions.

An executive at MLS since 1996, Ordower has been instrumental to the League's growth. He is a driving force the League's commercial and media strategy and has played a lead role in MLS's expansion surge to twenty-three clubs. On the player/competition side of the business, Ordower is a key member of the collective bargaining team. He created and continues to implement the MLS Substance Abuse and Behavioral Health Program and conducts League investigations regarding tampering and player-related issues.

Prior to joining the Legal Department, Ordower spent four years in Player Relations and two years in League Operations.

Before MLS, Ordower worked with tennis and basketball agents at ProServ, Inc. in Arlington, Virginia.

Ordower graduated in 1993 from Boston University, magna cum laude, with a Bachelor of Arts degree in English and earned his law degree in 1996 from The George Washington University Law School.

Originally from St. Louis, Ordower resides in Maplewood, New Jersey, with his wife and three children.

JENNIFER O'SULLIVAN, ESQ.

Biography

Jennifer is a trusted advisor to sports leagues, teams, and media and technology companies.

Jennifer specializes in the representation of professional sports leagues, teams, media and technology companies, investors, promoters, hospitality companies and sports, entertainment, and lifestyle agencies. Jennifer counsels sports and entertainment clients on issues ranging from mergers and acquisitions and other transactions to sponsorships, advertising, media matters, league formations and restructurings, and all forms of commercial agreements, including licensing, merchandising and promotional agreements, venue, vendor, and other special events agreements.

Previous Work

Prior to joining Arent Fox, Jennifer was a partner at a boutique firm where she was head of the firm's Sports and Entertainment Practice Group. She also served as General Counsel of RSE Ventures, LLC, a sports and entertainment venture company and was previously the Commissioner & CEO of Women's Professional Soccer (WPS), the highest level women's professional soccer league in North America. In addition to stints with two prominent law firms, Jennifer has also held positions at the Arena Football League, NFL, and the Interpublic Group of Companies (IPG), where she worked with various IPG agencies including Octagon, its global sports, entertainment and lifestyle marketing agency.

Professional Activities

Sports Lawyers' Association
Former member of the Board of Directors of Women in Sports and Events (WISE)
Association of the City Bar of New York

Industries

Fashion & Retail
Hospitality
Media & Entertainment
Sports

Practices

Advertising & Promotions
Corporate & Securities
Trademark

Education

Columbus School of Law at The Catholic University of America JD
University of Richmond BA

Life Beyond the Law

Jennifer and her husband are the proud parents of three active children. When she's not attending live sporting events (both client and kid related), Jennifer's other personal interests include yoga, reading, cooking and spending time with her family.

Court Admissions

US District Court, Southern District of New York

KRISTIN KLEIN WHEATON, ESQ.

Biography

Kristin Klein Wheaton counsels and defends the interests of clients facing employment and labor issues, civil rights and discrimination claims, and complex commercial disputes. A skilled problem solver with over 20 years of legal experience in both the private and public sectors, Kristin's wideranging practice includes labor and employee relations, contract negotiations, and assisting clients with the creation and maintenance of compliance strategies for state and federal laws.

Kristin dedicates a significant portion of her practice to providing day-to-day employment and labor counseling to a wide variety of clients. These include municipal bodies, such as towns, villages, counties, law enforcement bodies, and public entities; long-term care facilities, colleges and universities, and nonprofits; and the full gamut of private sector employers, in fields from health care and hospitality to logistics and manufacturing. Kristin frequently offers comprehensive counsel on employment concerns including issues involving personnel, discipline, and leave administration. Kristin also provides guidance on fine-tuning, overhauling, or drafting from scratch her clients' policies, procedures, and handbooks. She represents her clients in hearings before the National Labor Relations Board (NLRB) and the Public Employment Relations Board (PERB), as well as in arbitrations and traditional labor negotiations. Kristin's record of success in hearings, arbitrations, and negotiations is proof of her skill at achieving highly favorable settlements and agreements, saving her clients time and legal dollars and avoiding the distraction, risk, and publicity of a trial.

Kristin also is adept at negotiating employment agreements and severance agreements and has extensive experience conducting and counseling on internal employee investigations and audits. Kristin's practice includes defending her clients against discrimination and civil rights claims in hearings before the Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (DHR). Her experience in this area also extends to housing issues.

Kristin has defended property management companies, homeowners associations, realty groups, and other clients in a wide variety of discrimination and civil rights matters involving allegations ranging from reasonable accommodation and disability discrimination claims to racial discrimination claims. Kristin also has extensive experience handling claims before the United States Department of Justice, Office for Civil Rights, in areas including but not limited to discrimination claims based upon race, religion, disability, and national origin, as well as alleged failure to accommodate, to name a few.

As the former Executive Vice President for Legal Affairs at a large community college in Western New York, Kristin brings an unparalleled depth of experience and client-oriented service to higher education institutions facing a host of legal issues, from employment and labor policy drafting to union negotiations, audits and investigations, commercial leasing, and crisis management. In her previous role, Kristin reported directly to the president of the institution, and managed a team of 20 professionals across a range of departments. Kristin provided legal guidance to the Board of Trustees on a whole host of issues affecting the college, as well as guidance on meeting administration, bylaws and policy revisions. Kristin coordinated and represented the school in all of its legal matters, as well as union matters, including grievances, arbitration, negotiations and labor management meetings, tort and employment litigation, Title IX, financial aid and Education Law compliance, administrative proceedings, and more. She also instituted monthly labor management meetings and reduced grievances by more than 50 percent over her tenure — including a two-year period with no grievances from one of its four unions, and only three grievances total that went to arbitration. As an administrator, Kristin was also a member of numerous governance committees and was a member of the leadership team assigned to manage budgetary issues, accreditation issues, compliance issues and regulatory visits. As leader of Goldberg Segalla's Higher Education Practice Group, Kristin leverages that experience on behalf of both public and private institutions of higher education across New York State and beyond.

Kristin also spent several years in the Erie County Attorney's Office, as an Assistant County Attorney, a First Assistant County Attorney, and the Acting County Attorney. Among other duties, she frequently appeared before the New York State Public Employment Relations Board, negotiated settlements with unions on employment issues, represented the county and its employees before a variety of state and federal courts and administrative agencies, and acted as in-house counsel for Erie County Commissioners and the County Sheriff. As counsel for the Commissioners of Personnel, Disability, and Equal Employment Opportunity, Kristin regularly advised on matters involving the New York State Civil Service Law and civil service administration, New York General Municipal Law, Open Meetings Law, Freedom of Information Law (FOIL), New York Public Officers Law, and legislative resolutions. She also represented the Erie County Board of Elections on election law proceedings. Kristin has extensive experience handling municipal litigation arising out of legislative enactments, and has achieved no cause of action verdicts in jury trials and favorable results on summary judgment in a variety of employment and civil rights cases — including claims involving discrimination, constitutional rights, negligence, and excessive force — in the U.S. District Court for the Western District of New York, as well as in CPLR Article 75 and 78 proceedings in New York State Supreme Court. Kristin has broad experience handling inmate condition claims, as well as claims brought under New York General Municipal Law section 207-c.