

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Lessons from USADA v. Jenkins: You Can't Win When You Beat a Monopoly

Michael S. Straubel*

I. INTRODUCTION

According to the reporters who wanted to speak with LaTasha Jenkins, she was the first athlete in the seven-year history of the United States Anti-Doping Agency (USADA) to win and clear herself of doping charges.¹ USADA's record was now thirty-seven and one.² Remarkably, the flawless record was beaten by a group of third year law students and their professor.³ But LaTasha did not want to speak with the reporters. To LaTasha, she had not won. She had been dragged through the mud, her career had been ended, and she was emotionally exhausted. Talking to reporters would only remind her of the damage done. She would never speak to reporters and quietly retire.

The story of *USADA v. Jenkins*, and the failed appeal by the World Anti-Doping Agency (WADA) that followed, is the story of a lucky win against a multi-headed foe that makes all the rules, then changes the rules when it loses, in a system nearly incapable of addressing the inherent imbalance of power between athletes and their accusers. The telling of LaTasha's story reveals the flaws of the Olympic Movement's anti-doping

* This article, as well as the effort in LaTasha Jenkins' case, was a group effort of the Valparaiso University Sports Law Clinic. The following Clinic members directly participating in drafting this article: Brian Raterman, Ehiman Uwidia, Jamie Flowers, Jeffrey Lehrman, Michael Meyer, Reid Murtaugh, Tiffini Grimes, and Alecia Pehr. The author wrote much of this article from personal knowledge of his experience with the details of LaTasha Jenkins' case and appeal.

1. See Amy Shipley, *U.S. Anti-Doping Agency Loses Its First Case: Jenkins Found Not Guilty*, WASH. POST, Dec. 15, 2007, at E04. USADA is an independent, anti-doping agency for the United States Olympic Movement. It is "responsible for managing the anti-doping testing and adjudication processes for member constituents pursuant to USADA Protocol for Olympic Movement Testing." *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 1 (2008).

2. *See id.*

3. *Id.*

system and suggests steps to fix those flaws. However, her story also shows that those flaws will not be fixed unless the underlying imbalance of power between athletes and those who control sports is changed.

II. THE STORY OF *USADA v. JENKINS*

A. *Athletic History*

LaTasha Jenkins became the first National Collegiate Athletic Association (NCAA) Champion in Ball State University history when she won the 200 meter sprint in 1999.⁴ After Ball State, LaTasha headed to Murfreesboro, Tennessee, to attend Middle Tennessee State University (MTSU) and to work with and be coached by longtime MTSU coach Dean Hayes. Under Coach Hayes' guidance, LaTasha steadily improved her times and moved into a top ten world ranking in the 100 and 200 meter sprints. Among her more notable accomplishments, LaTasha won the 2001 U.S.A. Track and Field (USATF) Indoor Championships in the 200 meters and a silver medal in the 200 at the International Association of Athletics Foundation (IAAF)⁵ World Indoor Championships that same year.⁶ She was ranked fourth in the world for the 200 meters that year.⁷ Over the next two years, LaTasha bounced between concentrating on the 100 meters and the 200 meters. In 2003, she finished fourth at the USATF Outdoor Championships,⁸ one spot away from qualifying for the World Championships.

After the 2003 season, injuries, burn-out, and life pushed LaTasha away from the track. In 2004, she went back to school and obtained her Master's Degree in Public Health from MTSU. Refreshed and repaired after obtaining her Masters, LaTasha returned to training in 2005. This time, her sponsor, Nike, did not want her to train with Coach Hayes. As a condition of her sponsorship contract, Nike told LaTasha that she had to leave

4. ANTHONY O. EDMONDS & E. BRUCE GEELHOED, BALL STATE UNIVERSITY: AN INTERPRETIVE HISTORY 99 (2001).

5. The IAAF is the world governing body for a variety of sport athletes, including track and field. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 3.

6. USA Track & Field, LaTasha Jenkins, http://www.usatf.org/athletes/bios/oldBios/2003/Jenkins_Latasha.asp (last visited Nov. 17, 2009).

7. *Id.*

8. *Id.*

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Murfreesboro and Coach Hayes for Raleigh, North Carolina, and Coach Trevor Graham, the most successful sprint coach in the world at that time.⁹

LaTasha reluctantly uprooted and moved to Raleigh, only to discover she really was not being coached by the soon infamous Trevor Graham. LaTasha was the new, less accomplished, outsider to Graham's training group. Graham ignored her, so LaTasha trained on her own at another track. She only saw Graham at group meetings, and her workouts were designed by Graham's assistant. But LaTasha would later find that she could not escape the taint of her connection to Coach Graham. She would soon sorely regret leaving Murfreesboro and Coach Hayes.

The new training in Raleigh was different and hard on LaTasha's weak knees—the same knees that gave her problems in 2002 and 2003. In October 2005, she underwent knee surgery at Duke Medical Center. Her recovery from the surgery and slow return to training not only kept her away from Coach Graham but also slowed her return to racing fitness and success in the early U.S. outdoor season; she did not regain her speed until mid-season and had few contacts with Coach Graham during her recovery. However, one group meeting with Coach Graham caused her concern. At that meeting, Coach Graham handed out a list of dietary supplements and instructed everyone in the group to take them. All of the supplements were available for purchase at stores like Vitamin World and GNC. Coach Graham later asked for the lists back, but LaTasha kept her list. She purchased the over-the-counter supplements and took them as directed.

After a mediocre U.S. outdoor season, LaTasha headed to the European Circuit. She ran mid-level meets and gradually regained her form of 2001 and 2002. After winning the 100 meter sprint on July 22, 2006, at a meet in Heusden, Belgium, she was told that she had to give a urine sample.¹⁰ This testing marked the beginning of the worst eighteen months of her life.

B. The European Testing

LaTasha had been tested many times before, so she knew right away that the conditions of the sample collection site were not appropriate. The temperature at the testing facility was over ninety degrees, and the room where her sample was collected and stored was not air conditioned, dirty,

9. Dick Patrick, *Graham Can't Outrun Questions*, USA TODAY, Aug. 8, 2005, available at http://www.usatoday.com/sports/olympics/summer/2005-08-07-graham_x.htm.

10. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 4.

and smelled of urine. Furthermore, the room was filled with smoke, and the Doping Control Officers smoked cigarettes as they collected samples. After her sample was collected, it remained unrefrigerated for four days until it was received by the WADA lab in Ghent, Belgium; these were prime conditions for sample degradation or contamination.

On August 2, 2006, the Ghent Lab reported to the IAAF that LaTasha's A-sample was positive for 7.8 ng/ml of nandrolone.¹¹ Nandrolone is a naturally occurring anabolic androgen, and WADA established a threshold—totals above the threshold are considered a doping violation.¹² The first threshold established by WADA was 5.0 ng/ml, which was later lowered to 2.0 ng/ml.¹³ Certain conditions can naturally raise nandrolone totals in women, such as pregnancy and oral contraceptives.¹⁴ Bacterial contamination can also cause increases in nandrolone counts.¹⁵ Nandrolone has many times been the culprit in dietary supplement contamination.¹⁶ In fact, measurements of nandrolone below 50 ng/ml often indicate supplement contamination.¹⁷ Intentional use of nandrolone routinely results in totals in the range of 100,000 ng/ml.¹⁸ The margin of error for the Ghent Gas Chromatography/Mass Spectrometry (GCMS) nandrolone test was 2.0 ng./ml.¹⁹

11. The report actually reported a positive for norandrosterone. *Id.* at ¶ 8. Norandrosterone is a metabolite of nandrolone. *Id.* at ¶ 9. The Cologne lab identified nandrolone on August 8. *Id.* at ¶ 11. The article will refer only to nandrolone, which refers to the results of all the reports.

12. World Anti Doping Agency, World Anti-Doping Code, The 2009 Prohibited List, International Standard, http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf.

13. World Anti-Doping Agency, Technical Document TD 2004 NA, http://www.wada-ama.org/rtecontent/document/nandrolone_aug_04.pdf [hereinafter WADA TD 2004 NA].

14. See R.M. N. Kohler & M. I. Lambert, *Urine Nandrolone Metabolites: False Positive Doping Test?*, BRIT. J. SPORTS MED. 325, 326 (2002); see also WADA Technical Document TD 2004 NA, *supra* note 13, at 2.

15. See J. Delanghe, *A Critical Investigation of the Genevieve Jeanson Case*, <http://veloptimum.net/courses/athletes/Jeanson/E/6/DelangheReport.html> (last visited Sept. 13, 2009).

16. Don Catlin, et al., *Trace Contamination of Over-the Counter Androstenedione and Positive Urine Test Results for Nandrolone Metabolite*, 284 JAMA 2618 (2000).

17. Testimony of Dr. David Black. See also Catlin, *supra* note 16.

18. *Id.*

19. The standard of error is established by an acceptable range of z-scores, outlined in the WADA International Standard for Laboratories, which requires a z-score of less than 2.0 ng/ml. World Anti-Doping Agency, Int'l Standard for Laboratories § 3.5, at 85 (2009), http://www.wada-ama.org/rtecontent/document/International_Standard_for_Laboratories_v6_0_January_2009.pdf [hereinafter WADA ISL 2009]. Furthermore, the minimum detection standard is established by WADA for the testing labs; the standard sets the minimum amount of a Prohibited Substance that a testing lab must be able to detect. World Anti-Doping Agency, Technical Document TD 2004

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Not until August 22, 2006, was LaTasha notified of the positive A-sample test, and at that time she requested that the B-sample be tested.²⁰ On September 25th, she was notified that the B-sample was positive, a reading of 12.3 ng/ml.²¹ The difference between 7.8 ng/ml and 12.3 ng/ml is a statistically significant 57% increase.²²

About the same time that LaTasha was officially notified of the A-sample results, they were leaked to the press in Europe. She was pelted by questions from the press and linked to Coach Graham's other athletes that had tested positive.²³ Meet promoters immediately withheld prize money she had earned, and Nike suspended its contract with her. In the United States, test results cannot be released until the full results management process is completed.²⁴ In Europe, unfortunately leaks are common, despite the rules.

Meanwhile, without her knowledge and without explanation, LaTasha's A-sample, and later her B-sample, was sent to the Cologne WADA lab by the IAAF for Isotope Ratio Mass Spectrometry (IRMS) testing.²⁵ IRMS testing does not determine the quantity of a substance; rather, it determines whether a substance is natural (endogenous) or artificial (exogenous).²⁶ The Cologne Lab's test of the A-sample showed the nandrolone to be artificial.²⁷

MRPL, at 2, http://www.wada-ama.org/rtecontent/document/perf_limits_2.pdf [hereinafter WADA TD 2004 MRPL].

20. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 12 (2008).

21. The Ghent lab reported its findings to USATF on September 21, and, on September 22, USATF requested that USADA handle the test results under its Protocol. *Id.* at ¶¶ 13, 14.

22. When there is a measurement increase of this amount, it raises questions about the precision of the measurement or the stability of the sample. We wondered if there was a growing bacterial contamination. However, the lab documents reported that the PH levels were stable.

23. *Source: Another of Graham's Track Pupils Test Positive for Steroids*, USA TODAY, Aug. 25, 2006, available at http://www.usatoday.com/sports/olympics/summer/track/2006-08-24-jenkins-doping_x.htm.

24. See U.S. Anti-Doping Agency, Protocol for Olympic and Paralympic Movement Testing, art. 16, at 14 (2009), available at http://www.usantidoping.org/files/active/policies_procedures/usada_protocol.pdf [hereinafter USADA Protocol 2009].

25. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 16.

26. World Anti-Doping Agency, Guideline: Reporting and Management of Elevated T/E Ratios, at 5, <http://www.wada-ama.org/rtecontent/document/GuidelineReportingManagementElevatedTERatios.pdf> (A positive IRMS result means that the nandrolone was of exogenous, artificial source). See also, WADA ISL 2009, *supra* note 19, § 5.4.4.4.1.2, at 58.

27. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 11.

We at the clinic wondered if something had gone wrong at the Ghent lab, something the Cologne lab testing was supposed to clean up.

After the Cologne A-sample test showed the nandrolone to be artificial, and the initial B-sample results were back, LaTasha accepted a provisional suspension on October 23, 2006.²⁸ A bill for €250 accompanied the notification of the positive B-sample. In Europe, the athlete has the burden of paying for the evidence that may exonerate her, but that same evidence is also necessary for convicting him or her.²⁹ Section 2.1.2 of the World Anti-Doping Code states that proof of a doping offense requires either B-sample confirmation of the A-sample testing, or an athlete's waiver of the B-sample confirmation.³⁰ So we were quite perplexed by being asked to pay for the B-sample test. After some debate with USADA, and after we pointed out that USADA Protocol 2004 § 8(c) states that USADA shall provide an athlete with the B-sample documentation package set forth in Annex D, USADA agreed to request and pay for the Cologne lab B-sample testing.³¹ This would be the first of many disputes over the production of documents in this case. USADA requested IRMS testing on the B-sample, and received the results from the Cologne laboratory on December 20, 2006.³² LaTasha received notice of the IRMS positive (confirming artificial nandrolone) B-sample test on January 16, 2007.³³

C. Review Board and Discovery

It took some time to obtain all of the lab documents promised in USADA Protocol 2004 Annexes C and D. It also took a lot of work to read and understand the lab documents. As a pro bono clinic, we have limited resources to hire experts. We often rely on University faculty to give us a preliminary evaluation of lab documents, which they also provide pro bono.³⁴ In LaTasha's case, we had two sets of documents, one of GCMS testing and one of IRMS testing. In addition to looking at documents from

28. *Id.* at ¶ 15.

29. World Anti-Doping Agency, World Anti-Doping Code, art. 2.1.2, at 20 (2009), http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf [hereinafter WADC 2009].

30. *Id.*

31. U.S. Anti-Doping Agency, Protocol for Olympic Movement Testing, art. 8(c), at 6 (2004), <http://videos.usoc.org/documentsnotices/protocol.pdf> [hereinafter USADA Protocol 2004] (stating that the USADA shall give the athlete the sample documentation package if the 'B' sample confirms the 'A' sample).

32. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 16.

33. *Id.* at ¶ 17.

34. We received invaluable help understanding the lab documents from Professor Jon Schoer of Valparaiso University's Chemistry Department.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

two different testing procedures, a further difficulty lie in that parts of the documents were in Flemish and parts in German. When the time came to submit our arguments to the Review Board, we had only begun to understand the very documents on which we were to argue. Our argument to the Review Board focused on the problems during sample collection and the possibility of contamination. But, we also asked for an investigation of things we could not fully investigate ourselves, because of limits on discovery.³⁵ The Review Board returned a finding of probable cause, as to the possibility of doping, on February 14, 2007.

Review Boards are panels of three to five testing, medical, and legal experts appointed by the Board of Directors of USADA to review doping cases, at an early stage, to determine if sufficient probable cause exists to go forward with formal doping charges.³⁶ Written submissions are permitted, but no oral presentation or arguments are allowed, and the identity of the Review Board members is not made public.³⁷ However, USADA knows who sits on the Review Boards and has access to the submissions of athletes. Some athletes' lawyers no longer participate in the Review Board process; they see it as a black box fully controlled by USADA.

After the Review Board's finding, the arbitrator selection process began. Then, surprisingly, we spotted newspaper reports of a Court for the Arbitration of Sport (CAS) decision in which lab test results were excluded because an International Standard for Laboratories (ISL) rule had been violated.³⁸ That rule prohibited the same lab tech from handling or manipulating both the A and B samples of an athlete.³⁹ That story rang bells. We suspected that the same tech had been involved in both the A and B sample testing, in both the Ghent and Cologne labs. But we were still trying to determine the significance of that fact. We went in search of the CAS opinion to learn the details and figure out if it had any relevance to LaTasha's case. But the *Landaluce* case was nowhere to be found on the

35. We probably over estimated the role of the Review. We hoped that the Review Board would conduct its own investigation of demand more information from the labs of USADA in making its decision. However, the Review Boards function seems to be only to review the evidence put in front of it.

36. USADA Protocol 2009, *supra* note 24, art. 11(a), at 8.

37. *Id.*, art. 11(c), at 9.

38. UCI v. Landaluce & RFEC, TAS 2006/A/1119, at 20 (2006), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1119.pdf>.

39. World Anti-Doping Agency, International Standards for Laboratories, § 5.2.4.3.2.2, at 20 (2004), available at http://www.wada-ama.org/rtecontent/document/lab_aug_04.pdf [hereinafter WADA ISL 2004].

CAS website. CAS only now accepts the idea that its decisions should be available to the public, and in 2007, only some of its decisions were available and those only for a short period of time. If the *Landaluce* decision had been on CAS's website, it was only there for a short period of time and in French. By the time we learned of the decision, it was nowhere to be found. However, the decision seemed important, so we turned to the informal system that athletes' lawyers had been using for some time to find important arbitration decisions: we called around. Fortunately, Howard Jacobs, probably the most experienced doping defense attorney in the world, had a translated copy of the *Landaluce* decision, and he graciously sent it to us.

We immediately read *Landaluce* and became giddy with the hope that it created for winning LaTasha's case. In *Landaluce*, the same lab tech had handled and manipulated the athletes A and B sample, a direct violation of ISL 5.2.4.3.2.2.⁴⁰ Under the WADC burden shifting scheme, proof of an ISL violation served to switch the burden to the prosecution to show that the ISL violation did not undermine the validity of the lab results.⁴¹ Persuading the fact finder of that negative is a heavy burden. The *Landaluce* panel found that the prosecution could not prove that the samples had not been tampered with or adulterated, intentionally or accidentally.⁴²

The documents from both of LaTasha's lab reports showed that the same technician worked on testing both the A and the B samples, but they reportedly performed different tasks when testing the A-sample than when testing the B-sample. From what we learned from the experts on campus, the tasks performed on the A and the B samples, while different, both involved handling and manipulating the sample: a violation of the *Landaluce* panel's interpretation of ISL 5.2.4.3.2.2. So, in the hope of ending the case quickly, we wrote a letter to USADA requesting reconsideration of the charges against LaTasha and resubmission of the case to the Review Board, two reasonable requests in light of *Landaluce*. USADA declined, asserting that the violation of ISL 5.2.4.3.2.2 should have been raised in January, before the case went to the Review Board.

40. ISL 5.2.4.3.2.2 reads: The 'B' sample confirmation must be performed in the same laboratory as the 'A' sample confirmation. A different analyst must perform the 'B' analytical procedure. The same individual(s) that performed the 'A' analysis may perform instrument set-up and performance checks and verify results. WADA ISL 2004, *supra* note 39, § 5.2.4.3.2.2, at 20.

41. *Id.* § 2.0, at 7 (citing WADC § 3.2.1 (2003)) ("If the Athlete rebuts the presumption by showing that a departure from the International Standard occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.").

42. *Landaluce & RFEC*, TAS 2006/1/1119, at 21.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Discouraged but not surprised by USADA's response, we set about constructing an argument that the ISL had been violated and that the violation undermined the reliability of the lab results. We knew that under the current WADC once a violation of an ISL was proven, the burden shifted to USADA to prove that the violation did not undermine the reliability of the lab results.⁴³ However, we also knew from past cases that in reality we had to prove the lab results were unreliable. Partly a function of the WADC presumptions of laboratory compliance,⁴⁴ partly a function of the media created presumption that all athletes take Performance Enhancing Drugs (PEDs), partly a function of the mystique of scientists in white lab coats (aided by television shows like CSI), and partly a function of the arbitrators relative lack of experience with these technical, scientific questions, the lab results were essentially seen as foolproof. Therefore, we had to prove two elements: first, that although the lab conducted different procedures, each procedure conducted by the lab technician in question involved handling and manipulating the sample; second, that violation of ISL 5.2.4.3.2.2 conclusively undermined the validity of all lab results. We needed more details on the lab's procedures, namely the labs standard operating procedures (SOPs), and the policy behind ISL 5.2.4.3.2.2.

Both ISL 7.1 and WADA Technical Document 2003 LDOC prohibit the discovery of SOPs, a strange thing to find in rules designed for the trustworthiness of lab results.⁴⁵ The prohibition seemed to be one more example of WADA and the system insulating and protecting test results from complete scrutiny. But, in our favor, rule R-18 of the Supplementary Procedures, the procedural rules for doping arbitrations in the United States, gave arbitrators the discretion to order the production of "documents and other information."⁴⁶ So we asked USADA for the SOPs of both laboratories. The response: No. The rules prohibit discovery of SOPs and the SOPs are proprietary information, jealously guarded by each lab.

43. World Anti-Doping Agency, World Anti-Doping Code, art. 3.2.1, at 13 (2003), *available at* http://www.wada-ama.org/rtecontent/document/code_v3.pdf [hereinafter WADC 2003].

44. The International Standard for Laboratories, 1.0 Introduction, Scope and References, in part reads: Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures covered by the International Standard were performed properly. WADA ISL 2004, *supra* note 39, art. 1.0, at 4.

45. *Id.* art. 7.1, at 46; *see also* WADA TD 2004 NA, *supra* note 13, at 2 (not requiring reporting of anything beyond test results).

46. American Arbitration Association, Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes, Rule 18 (2004), *available at* <http://www.adr.org/sp.asp?id=36205> (follow the link to R-18) [hereinafter AAA Supplementary Procedures 2004].

When the panel was assembled during the preliminary hearing, which is primarily a phone conference to set a schedule for briefing and the hearing, we renewed our request for the SOPs. Because USADA continued to refuse production of the SOPs, we were forced to file a formal demand for production. Essentially, we made a three-pronged argument for production of the SOPs. First, we argued the need for the SOPs to understand the lab documents in light of ISL 5.2.4.3.2.2. Second, we contended we would be unable to cross-examine USADA witnesses, particularly lab personnel, without the SOPs. Third, we requested the exclusion of any USADA witnesses or evidence of compliance with ISL 5.2.4.3.2.2, should the SOPs not be produced. Surprisingly, the panel agreed with us and ordered the production and translation of the SOPs. Still, USADA fought to limit the production. The final order of production was issued on June 28, 2007, only two weeks before the hearing dates.⁴⁷ The translations were done by the same lab technicians accused of violating ISL 5.2.4.3.2.2.

D. American Arbitration Association (AAA) Hearing

The full hearing was set for July 12 and 13, 2007, in Chapel Hill, North Carolina.⁴⁸ For the clinic members, July was a difficult time to hold the hearing. Third year students who had graduated in May were studying for the Bar Exam. Second year students were new to the case, joining the team only in the late spring (to take over for graduating students unable to continue into the summer). Brandon Sanchez and Rebecca Meyer were carry-over third year students who had been working on the case since its beginning. Mike Zonder and Kevin Huss were second year students doing a quick study of the law and facts to prepare for the hearing. Despite these difficulties, we were ready. We had written a thorough prehearing brief, lined up one of the best experts in the field (Dr. David Black, testifying pro bono), prepared three witness (LaTasha, Coach Dean Hayes, and Soubel Al Awar, LaTasha's former employer), and quickly digested the laboratory SOPs. Then, on July 6, 2007, out of the blue, the hearing was canceled. The panel president, Mr. Yves Fortier, had to attend an emergency Board of Directors meeting. As originally scheduled, the hearing was ten days short of a full year since the sample was taken. Now rescheduled for October 29 and 30, 2007,⁴⁹ the case was likely to not come to a conclusion until November 2007, at the earliest. Besides extending LaTasha's provisional suspension, the delay forced the clinic to figure out who could carry on with

47. USADA v. Jenkins, AAA No. 30 190 00199 07, at ¶ 25 (2008).

48. *Id.* at ¶ 26.

49. *Id.*

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the case. Each team member had developed a particular expertise that would be very hard to convey. Luckily, Brandon and Rebecca were staying in the area and could continue working on the case. However, the delay created hardship for everyone in coordinating preparation.

Once the hearing convened, USADA put its case on first, even though it had to call the two laboratory directors out of order on the second day because of scheduling problems and the time difference with Europe.⁵⁰ They testified by phone. USADA satisfied its initial burden of proving an “adverse analytical finding” by submitting the laboratory test results through the testimony of Dr. Larry Bowers, USADA Senior Managing Director and resident laboratory expert.⁵¹ USADA then turned to our ISL violation arguments. Dr. Bowers testified that he participated in the drafting of ISL 5.2.4.3.2.2 and that the ISL should be interpreted to prohibit only the same person from performing the same procedure on both the A-sample and the B-sample.⁵² That testimony was followed by testimony on the reliability of the IRMS testing, setting up the argument that even in the face of an ISL violation, the IRMS results were impeachable.⁵³ Despite testifying about how ISL 5.2.4.3.2.2 should be liberally interpreted, on cross-examination Dr. Bowers admitted that a literal violation of the rule occurred.⁵⁴

After Dr. Bowers testified, but before the lab directors testified, LaTasha took the stand, so to speak.⁵⁵ She testified to the sample collection problems, the supplements that she took, and the effect that the length of the process had on her. USADA challenged her on cross-examination by producing the packaging of one of the supplements she took, which contained a statement on the packaging boasting that the supplement stimulated the production of testosterone. USADA’s hope was apparently to either discredit LaTasha as either careless or characterize her as intentionally seeking out PEDs. USADA also challenged LaTasha’s testimony and our argument of improper sample collection with testimony from two USADA doping control officers. These challenges really shook LaTasha.

50. *Id.* at ¶ 34.

51. *Id.* at ¶ 32.

52. *Id.* at ¶ 42.

53. *Id.* at ¶ 47.

54. *Id.* at ¶ 45.

55. The hearing was held in a hotel conference room. There was a makeshift place in the front of the room where live witnesses sat and the speaker phone was placed for testimony by phone. There is no record of LaTasha’s testimony in the AAA record other than a brief mention that she testified.

The second day of the hearing brought the critical testimony of the two lab directors and Dr. Black. Both directors, Dr. William Schanzer of the Cologne Laboratory and Dr. Franz Delbeke of the Ghent Laboratory, testified to the procedures followed in their labs, the significance of the documents and results in this case, and their compliance with ISL 5.2.4.3.2.2 and ISL 5.2.5.1.1,⁵⁶ which reads: “A minimum of two certifying scientists must independently review all Adverse Analytical Findings before a report is issued. The review process shall be documented.”⁵⁷ Both Directors pointed to lab documents with hand written initials, though there was no text or statement of certification accompanying the initials.⁵⁸ On cross examination, both lab directors testified that the rule encompassed in ISL 5.2.4.3.2.2 was unnecessary and an insult to the integrity of their labs and lab personnel. They both opposed the rule and liberally interpreted it to only prohibit the same person from performing the same task on both the A-sample and the B-sample.⁵⁹ While the same lab technician may have handled or manipulated both the A-sample and the B-sample, he had not performed the same procedures on the A-sample and of the B-sample.⁶⁰ We also established that the lab technicians knew that they were working on the B-samples of positive A-samples that they worked on.

Dr. Black followed the lab directors with testimony to the purpose of ISL 5.2.4.3.2.2 and the effect of an ISL violation. According to Dr. Black, the purpose of the ISL was to protect from intentional and accidental errors which would not be reported in lab documents.⁶¹ Further, he testified that the steps performed by the laboratory technicians in both labs on the B-sample did not come within the exception to the general rule of ISL 5.2.4.3.2.2 found in the last sentence of ISL 5.2.4.3.2.2.⁶² That last sentence reads: “The same individual(s) that perform the ‘A’ analysis may perform instrument set up and performance checks and verify results.”⁶³ That

56. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 70; WADA ISL 2004, *supra* note 39, § 5.2.4.3.2.2, at 20, § 5.2.5.1.1, at 17.

57. WADA ISL 2004, *supra* note 39, § 5.2.1.1, at 17.

58. See *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 55. We made the argument in the pre-hearing brief that ISL 5.2.5.1.1 required a clear, separate statement from two scientists that they had reviewed the lab documents and certified that the testing had been done properly. In both sets of lab documents here there was, at the most, only one scientist’s signature following any kind of statement that a review had been done. According to the testimony of the lab directors, the second certification was the initials of a staff member on the side of one of the lab documents. There was certainly no statement of any kind accompanying the initials.

59. *Id.* at ¶ 54.

60. *Id.*

61. *Id.* at ¶ 48.

62. *Id.* at ¶ 50.

63. WADA ISL 2004, *supra* note 39, § 5.2.4.3.2.2, at 20.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

testimony and the last sentence of ISL 5.2.4.3.2.2 would prove pivotal in the outcome of the case.

Dr. Black was the last to testify, and the proofs were closed. Surprisingly, and to USADA's great credit, there had been no attack on LaTasha's connection with Coach Graham. The connection with Coach Graham was mentioned, but not emphasized, and we were not sure why. Nevertheless, closing arguments loomed. We had a closing prepared, but we had the feeling that two of the arbitrators were impatient to end the hearing and catch planes. Both parties were offered the choice of giving a very short, ten minute closing, or submitting a written closing. We agreed with USADA to submit, simultaneously, written closing arguments.⁶⁴ That gave us a chance to think through the questions that seemed to be troubling the arbitrators.

Both parties submitted closing arguments, and the panel declared the record closed on November 22, 2007.⁶⁵ At this time, according to Supplementary Procedure R-43,⁶⁶ an award must be made within ten days of the closing of the record, and according to R-44,⁶⁷ that award shall be reasoned. However, in the place of a reasoned award within ten days, the panel, as it had warned it might do, issued an "award" without reasoning within the ten day mandate. Then two months after the record closed, the panel issued a reasoned award. According to the panel's president, this is common practice in commercial arbitration, particularly in Europe. The "award" was issued on December 12, 2007,⁶⁸ and the reasoned award was issued on January 25, 2008.⁶⁹

On December 13 the headlines read: "U.S. Anti-Doping Agency Loses Its First Case: Jenkins Found Not Guilty."⁷⁰ When we called LaTasha with

64. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 28.

65. *Id.* at ¶ 30.

66. Supplementary Procedure R-43 reads:

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 10 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.

AAA Supplementary Procedures 2004, *supra* note 46, at Rule 43.

67. AAA Supplementary Procedures, Rule 44 reads: "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." *Id.* at Rule 44.

68. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 31.

69. *Id.* at ¶ 162.

70. See Shipley, *supra* note 1.

the news, all she could do was scream, “Oh my God, oh my God, oh my God.” It was a heady couple of days. No one had beaten USADA before. We deliberated over what might happen next. Bill Bock, USADA’s General Counsel, graciously called to congratulate us. We warned LaTasha that the case could be appealed.

The “award” was three sentences long. The panel found that ISL 5.2.4.3.2.2 had been violated, that USADA had failed to prove that the ISL violation did not undermine the lab test results, and therefore, that USADA had failed to prove to the comfortable satisfaction of the panel that a doping violation had occurred.⁷¹ The first question we had was whether this triggered the start of the appeal periods. Also, we wondered whether LaTasha’s suspension was over, whether the “award” was reasoned enough, and what we were to tell LaTasha.

The full, reasoned award came out six weeks later. The panel had strictly construed ISL 5.2.4.3.2.2 and agreed with us that it had a prophylactic purpose.⁷² But they broadly construed ISL 5.2.5.1.1.⁷³ The panel wrote, “In view of the grave implications for athletes . . . who are held strictly to account for any transgression of applicable anti-doping rules, testing laboratories must also be held strictly to account for any non-compliance with those same rules.”⁷⁴ ISL 5.2.4.3.2.2 was critical to the integrity of the lab’s test results, and its breach could not be cured by unsupported claims of innocence. The panel interpreted the first two sentences of ISL 5.2.4.3.2.2. to create a general prohibition, partly because of the closed list of exceptions to the general rule found in the last sentence of ISL 5.2.4.3.2.2.⁷⁵ The panel further wrote:

USADA therefore has the burden of demonstrating to the Panel’s comfortable satisfaction that the violation of the standard in question did not cause the athlete’s adverse analytical finding. There are certain inherent difficulties in discharging this burden. First and foremost, it requires proof of a negative.⁷⁶

This panel, as unlikely as it seemed to us during the hearing, had brought some balance back to the process.⁷⁷

71. *USADA v. Jenkins*, AAA No. 30 190 00199 07, at ¶ 159.

72. *Id.* at ¶ 135.

73. *Id.* at ¶ 139.

74. *Id.* at ¶ 136.

75. *Id.* at ¶ 123 (excepting instrument set up, performance checks, and results verification).

76. *Id.* at ¶ 151.

77. During Dr. Bower’s testimony, we thought that the panel was very receptive to the claim that the IRMS test was foolproof.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

E. WADA Appeal

Was LaTasha now free to compete? An athlete had not prevailed before, at least in the United States, so we were unsure whether she had to wait until the end of the appeal process before she was eligible, whether she would have to undergo reinstatement testing, and whether the meet promoter would let her race, regardless of her win. LaTasha started training, but there was doubt as to whether the process was finished. That doubt was confirmed on February 20, 2008, when we received word, first from a reporter, that WADA had appealed to CAS. LaTasha was angry and devastated. She seriously considered giving up. She did not want to go through a full hearing again. She had been forced to accept a life without track by the year-and-one-half suspension; she was beaten down by the process and hearing. LaTasha informed us that we had to find a way to do the second hearing without her. We were now fighting for principle, not to get LaTasha back on the track.

The first skirmish of the appeal centered on whether the appeal period started with the December 12th “Award” or the January 25th Award and Reasoning. We lost that one.⁷⁸ That loss gave us the feeling that we were the visiting team and that the referees (CAS administrators at this point, the panel had not yet been appointed) were being influenced by the cheering of the home team. However, USADA was not taking part in the appeal.

78. There were two different and potentially applicable rules on the start and length of time to appeal CAS. Code of Sports-Related Arbitration Rule 49 reads:

In the absence of a time limit set in the statutes or regulations of the federation, association, or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one (21) days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

Code of Sports-Related Arbitration, Rule 49 (2004), <http://www.tas-cas.org/rules> (follow links to Appeal, Arbitration Process) (emphasis added). International Association of Athletics Foundation (IAAF) Rule 60 (25) reads: “Unless the Council determines otherwise, the appellant shall have thirty (30) days from the date of communication of the written reasons of the decision to be appealed . . . in which to file his statement of appeal with CAS.” Int’l Assoc. of Athletics Foundation, Rule 60(25), available at <http://www.iaaf.org/aboutiaaf/publications/rules/index.html>. We argued that the IAAF rule should be interpreted, in this case, in light of CAS Rule R-49 because of the exceptional nature of this case. Those exceptional circumstances were that the athlete had already served the equal of a year and one-half suspension (approaching the maximum suspension allowable if found guilty) and that she had been found not guilty. Therefore, the appeal period should run from the date of the December 12, 2007, “award” and would be considered manifestly late at this point. We stressed that an appeal would, for all practical purposes, stretch the suspension to two years, and was thus abusive and punitive in and of itself.

Under CAS rules, an appellant must submit its appeal brief and list of witnesses, along with a statement of those witnesses' expected testimony, within ten days of the end of the appeal period.⁷⁹ On March 14, 2008, WADA filed a brief and a list of expected witnesses, but not a statement from each witness. WADA was granted permission to file the statement of Professor Ayotte at a later time.

WADA's brief brought no revelations, no arguments not raised by USADA and no arguments not decided by the first panel. It appeared that WADA was judge shopping. WADA wanted non-North American arbitrators to decide the case. While we waited for Professor Ayotte's witness statement, we crafted new arguments to add to the successful ones used in the first hearing. We rewrote the facts to emphasize the abusive nature of the appeal as it pertained to LaTasha, and then we pled for deference. We argued that WADA must meet a burden of proving that the panel below had clearly made a mistake, akin to abusing its discretion.⁸⁰ We also argued that the new panel must not simply come to a different conclusion, it must also find that the first decision was clearly wrong. We were actually eager to argue for some level of deference that we believe the system clearly needs.

WADA was having trouble getting Professor Ayotte's witness statement, and it requested three time extensions. Then, out of the blue, WADA withdrew its appeal. On April 14, 2008, WADA wrote CAS:

[H]aving carefully reviewed the full scientific data of this case, which includes materials not available to us from the initial hearing, WADA has reached the conclusion that the adverse analytical finding cannot lead to a sanction of Ms. Jenkins. The reasons for this are other than the content of the appealed decision.⁸¹

Did this mean that WADA had new, exculpatory evidence? Why did WADA not turn this evidence over to us? We were anxious to know why

79. Code of Sports-Related Arbitration Rule 51 reads:

Within ten days following the expiration of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn. In his written submission, the Appellant shall specify any witnesses and expert whom he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

Code of Sports-Related Arbitration, *supra* note 78, at Rule 51.

80. *But see id.* at Rule 57 (2004) (stating that the appeal panel has full power to review both the facts and the law and come to a new decision if necessary, or refer the case back to the original court for new deliberation).

81. Letter from World Anti-Doping Agency to the Court of Arbitration for Sport (Apr. 14, 2008) (on file with author).

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

WADA withdrew the appeal. Did it have to do with the statement of Professor Ayotte? We would never officially know. But, some time later, we would learn from Dr. Black that Professor Ayotte informed him that she could not support WADA's appeal. On June 28, 2008, CAS issued a formal termination order.

LaTasha did not want damages from WADA. We asked. She just wanted it to be over. The case had brought the track years of her life to an end. She did not want to relive any part of the end to those years. We closed the file.

III. THE LESSONS FROM *USADA v. JENKINS*

Our experience from LaTasha's case and several other cases, including another unsuccessful WADA appeal in *USADA v. Thompson*,⁸² has revealed the current system's many problems. A listing of the harm done to LaTasha and the problems that we encountered in making her defense reveals the system's flaws. An analysis of those problems reveals fundamental, systemic causes of the problems that must be addressed to truly fix the system.

A. *The Harm Done to LaTasha*

The ultimate result of *USADA v. Jenkins* was that it ended LaTasha's track career. In all practical effect, she was suspended from competition from the time the A-sample lab report was leaked in August 2006, until WADA withdrew its appeal in April 2008. That suspension kept her from competing or training with any vigor for twenty months and killed any chance of being ready for the coming 2008 Olympic season. Her endorsement contract was suspended and never reviewed. Prize money was withheld and never paid to her. She endured twenty months of emotional distress and her reputation was forever damaged. If the clinic had not taken her case, her defense would have cost her thousands of dollars.

82. See *WADA v. USADA & Thompson*, CAS 2008/A/1490 (2008) (Carter, Arb.), available at [http://www.usantidoping.org/files/active/arbitration_rulings/ThOMPSON%20\(CAS\).pdf](http://www.usantidoping.org/files/active/arbitration_rulings/ThOMPSON%20(CAS).pdf); see *USADA v. Thompson*, AAA No. 52 190 00556 07 (2008), available at http://www.usantidoping.org/files/active/arbitration_rulings/AAA%20CAS%20Decision%20-%20Eric520Thompson%20January%202008.pdf.

B. Problems in Making LaTasha's Defense

Though LaTasha won, we had to fight through many roadblocks to make her case. Others have not been able to overcome many of these road blocks. Below is a listing, in no specific order, of the problems that we encountered in LaTasha's case and other cases.

1. Limits on Discovery

The World Anti-Doping Code (WADC), USADA Protocol, and International Standards on Laboratories (ISL) limit the laboratory documents that must be given to athletes.⁸³ For U.S. athletes, this limit begins with a provision in the USADA Protocol that lists the lab documents that must be provided to an athlete, and no more.⁸⁴ USADA has maintained that it is not obligated to provide any additional documents and the Protocol rule specifically states that an athlete must pay for the production of additional lab documents.⁸⁵ This limit on lab documents in the Protocol is supplemented by specific limits found in the WADA Technical Documents, like the prohibition on obtaining SOPs.⁸⁶

This limit on discovery is troubling because the critical evidence against an athlete is being produced inside a lab to which an athlete has virtually no access.⁸⁷ The reliability of the lab produced evidence depends on the care and skill of the laboratory personnel to conduct the tests properly. Procedures can be done improperly, either accidentally or intentionally, and not corrected or noticed, despite failsafe back-ups. Those accidents will not always show up in the documents. Further, though we hope this is never the case, accidents can be covered up. It is human nature to avoid being called out on a mistake, and when penalties loom, like job loss or lab decertification (or just discredit), so do the incentives to cover up mistakes.

83. See WADC 2003, *supra* note 43; USADA Protocol 2009, *supra* note 24; WADA ISL 2004, *supra* note 39.

84. USADA Protocol 2009, *supra* note 24, art. 9(c), at 6; *see also* USADA Protocol 2004, *supra* note 31, art. 8(c), at 6.

85. *Id.*

86. WADA ISL 2004, *supra* note 39, art. 7.1, at 46; WADA TD 2004 NA, *supra* note 13, at 2.

87. While an athlete is allowed to send a representative to observe the B-sample testing, that is an option rarely available to an athlete and when the 'B' process is observed, that observation is of limited value. USADA Protocol 2009, *supra* note 24, at § 9(b). Athletes are for the most part unable to send qualified observers to the B-sample testing because of the extreme expense of hiring and paying the expenses of an expert. The process can easily cost thousands of dollars. Further, the short time (everything is sent "promptly" according to Protocol requirements) between notification of the 'A' positive and 'B' testing makes the logistics difficult. Then, in many cases, the athlete, particularly the poor athletes, does not contact an attorney until after the B-sample has been tested.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

When the labs are shielded from full disclosure, athletes are left to the mercy of lab mistakes.

2. Inaccessibility of Foreign Evidence

Though inaccessibility to foreign evidence is a problem facing any party in an international dispute, it is an acute problem for an athlete with little resources going up against an accuser with worldwide reach and assets. The problem is even more troubling in the context of a quasi-criminal process, exacerbated by limited discovery rules. Witnesses and evidence are difficult to find and expensive to track down. Evidence may be in foreign languages and witnesses may not speak English.⁸⁸ The ability to send a representative to the testing of a B-sample can be practically unavailable.⁸⁹ And this is all compounded by the truth that the evidence is being created by the employees of those prosecuting the athlete (at the very least, those teaming with those prosecuting the athlete). Jeopardized parties may not want to help the athlete prove that they produced bad evidence.

3. Presumptions in Favor of Prosecution

The World Anti-Doping Code, USADA Protocol, and International Standards create presumptions that sample collection and laboratory procedures have been done in accordance with the International Standards.⁹⁰ Both then and now, the International Standards are conclusively presumed to be the best practice.⁹¹ They cannot be challenged.⁹² Ultimately, LaTasha had the burden of proving a violation of an International Standard. Once proven, the prosecution is permitted to counter with proof that the ISL violation did not undermine the validity of the lab results.⁹³

These presumptions and burdens create practically unchallengeable lab results. On top of this, the evidence that is needed to challenge these presumptions is produced by and in the hands of the prosecution team, which further limits the discovery of that information. In LaTasha's case,

88. USADA v. Jenkins, AAA No. 30 190 00199 07, at ¶ 26 (2008).

89. *See id.*

90. *See* WADC 2003, *supra* note 43, art. 3.2.1, at 13.

91. *Id.* *See also* WADC 2009, *supra* note 29, art. 3.2.1, at 27.

92. *See* USADA v. Landis, AAA No. 30 190 00847 06, at ¶ 151 (2007).

93. WADC 2003, *supra* note 43, art. 3.2.1, at 13. However, the 2009 version of the WADC has changed the burden placed upon the athlete.

we had to fight very hard for that evidence. Now, to increase the prosecution's chances, WADA has changed the burdens. Under the current WADC an athlete must prove both a departure from the ISL *and* that the departure likely caused the positive result.⁹⁴ This rule dramatically increases the burden on the athlete and makes the lab results conclusive and practically unchallengeable. That is an exhibition of unchecked power.

4. Precedent Not Readily Available

CAS does not publish all of its decisions; it publishes only those decisions it believes are important.⁹⁵ Until recently, decisions were only available on its website for a limited period of time. It is now creating an archive of case decisions.⁹⁶ But at last check, the archive was not working. On the other hand, USADA makes all AAA-CAS decisions available on its website.⁹⁷

AAA-CAS and CAS arbitrations recognize precedent.⁹⁸ Precedent is critical in preparing a case and advising an athlete. If we had not found the *Landaluce* decision, LaTasha would not have won. The Sports Law Clinic now maintains an online database of all available CAS, AAA-CAS, and International Federation arbitration decisions. It can be found at: www.sportslawclinic.org.

C. *Specific System Weakness*

In addition to the problems that we encountered in making LaTasha's defense, we encountered other problems that slowed the case or otherwise created problems or doubt about the system. Those problems are listed below, in no specific order.

94. Now, in addition to proving a departure from the International Standard, the athlete must prove that the departure "could reasonably have caused the Adverse Analytical Finding." WADC 2009, *supra* note 29, art. 3.2.1, at 27.

95. See Court of Arbitration for Sport, CAS General Information, <http://www.tas-cas.org/en/20questions.asp/4-3-229-1010-4-1-1/5-0-1010-13-0-0/> (last visited Oct. 17, 2009).

96. See Court of Arbitration for Sport, Database of CAS Awards, <http://www.tas-cas.org/jurisprudence-archives> (last visited Oct. 17, 2009).

97. See U.S. Anti-Doping Agency, Arbitration Results, <http://www.usantidoping.org/what/management/arbitration.aspx> (last visited Oct. 17, 2009).

98. See, e.g., USADA v. Hardy, AAA No. 77 190 00288 08, at ¶ 7.39 (2009) ("This Panel's decision is guided by CAS precedent and the CAS precedent to which we look applies Swiss law.").

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

1. Time Limits, Controls On The Over-All Process, Or Steps In The Process Are Inadequate And Not Rigorously Enforced.

The only time limits or control placed on the results management process, or the arbitration process, are the three month limit in the Supplementary Procedures,⁹⁹ and the appeal and briefing time limits found in the CAS appeal rules.¹⁰⁰ Further, as in LaTasha's case, those limits are not strictly enforced. Additionally, there are no time limits before a panel is created. The progress of a case is within the control of USADA from the time that the lab results are reported until a panel is assembled. However, time constraints exist in the new USADA Protocol, if the athlete is scheduled to compete in a protected competition or the trial for a protected competition.¹⁰¹ But if the athlete has accepted a provisional suspension, time constraints are not triggered until a panel is assembled.¹⁰²

2. Sample Testing Time Limits Are Inadequate And Not Rigorously Enforced.

While the USADA Protocol contains a time limit of three months for the reporting analytical results,¹⁰³ that time limit is too generous, particularly for a B-sample test, and it is not enforceable outside of the United States.¹⁰⁴ The 2004 ISL 5.2.4.3.2.1, states that the 'B' sample analysis should be completed within thirty days of notification of an 'A' sample positive.¹⁰⁵ But there is no enforcement mechanism for this standard, and it is routinely ignored. Further, the new ISL 5.2.4.3.2.1 states "The □B□ Sample analysis . . . shall take place no later than seven (7) working days following notification of an □A□ Sample Adverse Analytical Finding by the Laboratory."¹⁰⁶ But that same ISL excuses a delay caused by logistical reasons and contains no enforcement mechanism.¹⁰⁷

99. AAA Supplementary Procedure 2004, *supra* note 46, at Rule 24.

100. *See* Code of Sports-Related Arbitration, *supra* note 78, at Rule 49, 51, 55, 59.

101. *See* USADA Protocol 2009, *supra* note 24, arts. 14-15, at 13.

102. USADA Protocol 2004, *supra* note 31, art. 12, at 11.

103. *Id.* art 7(a), at 4.

104. WADA ISL 2009, *supra* note 19, art. 5.2.2.6, at 35.

105. WADA ISL 2004, *supra* note 39, art. 5.2.4.3.2.1, at 20.

106. WADA ISL 2009, *supra* note 19, art. 5.2.4.3.2.1, at 41.

107. *Id.*

3. Arbitrators Are Not Fully Dedicated To Hearing Cases.

Arbitrators hear cases as a second job or on a part time basis. Therefore, their other work demands can interfere with the progress of the doping arbitration by slowing the case down or even drawing the arbitrator's attention away from the case. Part time arbitrators can also be inexperienced in the rules and laws of doping matters. That inexperience can cause many problems, including a higher likelihood of being influenced by more experienced arbitrators.

4. Arbitrators Are Allowed To Serve Both As Arbitrators And As Counsel To Governing Bodies And Athletes.

The Code of Sports-Related Arbitration contains no prohibition against arbitrators also representing athletes or sports governing bodies in CAS proceedings.¹⁰⁸ Unfortunately, this leads to cases in which arbitrators sit in judgment of their former or future clients. Those clients are often sports governing bodies. Also, though an arbitrator may not have represented the governing body appearing before him or her, if the arbitrator has or will represent other governing bodies, particularly in doping matters, there is a unity of interest between governing bodies such that creates a conflict of interest. While the CAS Code permits challenges to an arbitrator's independence,¹⁰⁹ a party, most certainly an athlete, is loath to bring a challenge for fear of the ramifications in that case or future cases. At the CAS level, arbitrators are informed of a challenge and the identity of the party bringing the challenge.¹¹⁰ While the arbitrators at the AAA-CAS level are not, according to the rules and practice, informed of the identity of a party challenging an arbitrator's independence, the rules do not prohibit notification.¹¹¹

5. The Appointment Of Arbitrators By The Parties Creates The Possibility And Appearance Of Partiality.¹¹²

At the CAS level, and possibly at the AAA-CAS level, arbitrators are aware of which party appointed them. Even if arbitrators are not directly

108. See Code of Sports-Related Arbitration, *supra* note 78.

109. *Id.* at Rule 34.

110. *Id.* at Rule 34 (allowing the challenged arbitrator to respond to the claim of conflict).

111. See Code of Sports-Related Arbitration, *supra* note 78.

112. See generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS & EMPLOYMENT POL'Y J. 189, 190-194 (1997).

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

informed, they can easily surmise which party appointed them. This knowledge can create the repeat performer phenomenon, which suggests that arbitrators will subconsciously rule in a way that favors their reappointment in future cases. Arbitrators may behave this way when reappointment means being paid, by the hour, for hearing another case.

6. The De Novo Appeal Process Prolongs And Significantly Increases The Cost Of The Process.

All appeals within the CAS system are reviewed de novo.¹¹³ Repeating the hearing a second time prolongs the appeal as compared to an appeal on the record. A second full hearing, with all the costs of the first hearing repeated, is more expensive than an appeal on the record. When an athlete was successful at the first hearing, a de novo appeal, in fact any type of appeal, will prolong the de facto suspension. Therefore, the longer the appeal takes the longer the athlete continues to be punished despite an initial acquittal.

7. The De Novo Appeal Process Allows Judge Shopping.

The de novo appeal standard allows any party to completely repeat the same arguments and presentations it made in the first hearing, without having to show any errors or irregularities from the first hearing.¹¹⁴ This is the proverbial second bite of the apple. There is no need to raise new arguments or issues. The losing party can repeat its case to a new set of arbitrators. This judge shopping is made worse when parties that did not participate in the first hearing, but are in privity with the losing party, have standing to appeal. These new parties can appeal capriciously, as in LaTasha's case.

8. There Is No Obligation To Disclose Exculpatory Evidence.

As private, commercial arbitration, the prosecution in doping cases is under no obligation to disclose exculpatory evidence to the defense.¹¹⁵ This

113. Code of Sports-Related Arbitration, *supra* note 78, at Rule 57 (stating that the court can review all the law and the facts).

114. See Code of Sports-Related Arbitration, *supra* note 78, at Rule 57, 58.

115. See *id.* at Rule 56.

is particularly troubling when the critical evidence is produced by the prosecution's partners, namely the laboratories. When the burden is placed upon the athlete to prove a violation of laboratory procedures, full disclosure of all evidence, particularly potentially exculpatory evidence is necessary.

D. Big Picture Lessons

An analysis of the harm done to LaTasha, the problems that we encountered in making LaTasha's defense, and the system's other flaws reveals three systemic problems. The dominant conclusion is that a dramatic imbalance of power exists between those who make the rules and those who are subject to the rules. That imbalance of power in turn allows the other two problems to exist. The second problem is the mischaracterization of the legal nature of the relationship between the prosecutors in doping cases and the defendant: athletes. The legal relationship is not a dispute between members of a voluntary association, governed by concepts of contract law, as the prosecution insists that it is. In reality, a doping allegation is a disciplinary proceeding of a quasi-criminal character, and demands different treatment from civil disputants. The third problem is the use of the wrong model of dispute settlement to decide doping charges. Arbitration in general, and certainly commercial arbitration or arbitration based on the commercial arbitration model, fails to protect the weaker party (here athletes), and fails to protect their basic due process rights. The commercial arbitration model, besides characterizing disputes as a matter of the law of association, only serves to allow the dominant party to dictate to the subordinate party.

What follows is an analysis of this thesis and some suggestions for improving the system.

IV. WHO MAKES THE RULES OF THE ASSOCIATION

It is often said, by prosecutors in doping cases, that athletes voluntarily accept the rules that they are now being judged by when they become members of the governing body for their sport. Therefore, the argument proceeds, because athletes voluntarily accepted these rules, they must agree with them and cannot contest their application. However, if association with the governing body is truly a voluntary association, it is only fair to ask how the rules are made, who makes the rules, and whether an athlete has a choice in deciding to join the association. An examination of the process of rule making is a true assessment of the relative power relationship between the members of the association and the rights of the individual members of that association.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

A. *The World Anti-Doping Code*

The World Anti-Doping Code (WADC) is the fundamental source of rules that govern a doping charge. All international sports federations, all national governing bodies, and all national anti-doping agencies within the Olympic Movement must incorporate in their rules the mandatory provisions of the WADC.¹¹⁶ These mandatory provisions create the basic structure of the testing process (i.e., sample collection), the laboratory analysis process, the results management process (i.e., adjudication system, including burdens and presumptions), and the punishment.¹¹⁷ While individual International Federations and National Anti-Doping Organizations can add to the structure created by the mandatory provisions of the WADC, they cannot add features that conflict with the mandatory provisions.¹¹⁸

The WADC was recently redrafted, and went into effect on January 1, 2009.¹¹⁹ The redraft of the WADC started with the appointment of a Code Project Team by the Executive Committee of WADA.¹²⁰ The Code Project Team was composed of WADA staff members and two outside experts.¹²¹ The Code Project Team produced a draft code which was opened to comment from “stakeholders” during three consultative phases. Stakeholders were broadly defined to the point of allowing anyone to offer suggestions and comment for a new code.¹²² After the consultative phase was finished, the Code Project Team submitted a “final” draft of the new code, Version 3.0, to the World Conference on Doping in Sport for debate and approval. After approval by the attendees at the World Conference on

116. WADC 2003, *supra* note 43, at Introduction; *see also* WADC 2009, *supra* note 29, at Introduction.

117. *Id.* at Table of Contents.

118. *Id.* at Introduction. The USADA Protocol expands upon the mandatory provisions of the WADC; the Protocol specifically adds procedural detail and addresses requirements of the Amateur Sports Act. *See* USADA Protocol 2009, *supra* note 24.

119. *See* WADC 2009, *supra* note 29.

120. *See* WADA, 1st Consultation Phase, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=656> (last visited Oct. 17, 2009) [hereinafter WADA 1st Consult]; WADA, Play True Q & A: 2009 Code (January 1, 2009), http://www.wada-ama.org/rtecontent/document/QA_2009_Code_ed.pdf [hereinafter WADA 2009 Q&A] (referring to “an expert project management team which was overseen by the WADA’s executive committee”).

121. The Code Project Team that drafted the 2003 WADC and the 2009 WADC was headed by Mr. Richard Young, a member of the Colorado Springs firm Holme, Roberts and Owen. Mr. Young was the lead USADA Counsel in *USADA v. Landis*.

122. *See* WADA 2009 Q&A, *supra* note 120.

Doping in Sport, the 3.0 Code was approved by a unanimous vote of the WADA Foundation Board and WADA Executive Committee.¹²³

An analysis of the drafting and approval process shows that it is controlled by WADA. The decision on who will control the drafting process (the members of the Code Project Team), is made by the WADA Executive Committee.¹²⁴ The majority of the Code Project Team was comprised of WADA employees. The final decision on the Code is made by the WADA Foundation Board. The Foundation Board's members are all appointed by the International Olympic Committee and governments.¹²⁵ Any athletes or former athletes involved must be vetted and appointed by the International Olympic Committee or governments, and any suggestions for the Code from athletes are ultimately evaluated by and decided upon by bodies composed of WADA representatives.¹²⁶ Athletes' concerns and interests were not represented with any rigor or bargaining power during the drafting of the Code.

WADA's dominance in drafting the Code can be seen in the changed burdens contained in the new 2009 Code. Under the 2003 Code (i.e., Version 2.0) WADA accredited laboratories were presumed to have complied with the ISL standards when testing athlete's samples for banded substances.¹²⁷ International standards in the ISL are basic operating rules for accredited laboratories.¹²⁸ Athletes who challenge compliance with the ISL bore the burden of proving a violation by a balance of probabilities.¹²⁹ If a violation was proven by an athlete, the burden then shifted to the prosecution to prove that the ISL violation did not undermine the reliability of the positive test result.¹³⁰ However, now under the 2009 Code (i.e., Version 3.0), the athlete bears the dual burden of not only proving a violation of the ISL, but also proving that the departure "could reasonably have caused the

123. *See id.*

124. *See* SIRC, A GUIDE TO THE CODE (2007), available at <http://www.sirc.ca/newsletters/november07/documents/s-1045684.pdf>.

125. *See* World Anti-Doping Agency, Governance, Introduction, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=296> (last visited Oct. 17, 2009); Constitutive Instrument of Foundation of the Agence Mondiale Antidopage, art. 6 (Mar. 2008), http://www.wada-ama.org/rtecontent/document/constitutive_instrument_foundation.pdf.

126. *See* World Anti-Doping Agency, Governance, Athlete Committee, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=291> (last visited Oct. 17, 2009) (stating that members of this committee provide insight into athletes' roles in raising anti-doping awareness and emphasizing their role of providing feedback to government leaders about anti-doping initiatives).

127. *See* WADC 2003, *supra* note 43, art. 3.2.1, at 13.

128. *See* WADA ISL 2009, *supra* note 19, art. 1.0, at 75.

129. WADC 2003, *supra* note 43, art. 3.2.1, at 13.

130. *Id.*

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Adverse Analytical Finding.”¹³¹ The change in the burden shifting scheme certainly increased the burden on the athlete and will allow labs to be more lax in their compliance with the international standards.

B. Code of Sports-Related Arbitration

CAS doping arbitrations are procedurally governed by a combination of applicable International Federation provisions and the Code of Sports-Related Arbitration (CAS Code).¹³² For the most part, International Federation rules include the mandatory provisions of the WADC, and beyond those provisions, little more than time limits for appeals.¹³³ One of the mandatory provisions of the WADC requires that each International Federation allow for appeals to CAS. The majority of procedural rules, such as arbitrator selections, appeal standards, and hearing rules are contained in the CAS Code.¹³⁴ The current CAS Code was drafted and is amended by the International Council of Arbitration for Sport (ICAS), which is heavily dominated by members appointed by Olympic Movement governing bodies like the International Olympic Committee, International Federations, and National Olympic Committees.¹³⁵ Consequently, all of the arbitration rules have been drafted by the representatives of the Olympic Movement governing bodies with little input from athletes.

C. USADA Protocol and Supplementary Procedures

Doping prosecutions in the United States are governed by the rule of the applicable International Federation, the USADA Protocol, and the Supplementary Procedures. In the event of a conflict between the International Federation rules and the USADA Protocol, the Protocol

131. WADC 2009, *supra* note 29, art. 3.2.1, at 27.

132. Code of Sports-Related Arbitration, *supra* note 78, at Rule 26.

133. *See generally id.*

134. *See generally* Code of Sports-Related Arbitration, *supra* note 78.

135. *See* Code of Sports-Related Arbitration, Statutes S4, <http://www.tas-cas.org/statutes> (follow the link to “Composition” under ICAS). ICAS is composed of twenty (20) members. *Id.* Four members are appointed by the International Federations. *Id.* at Statute 4(a). Four members are appointed by the National Olympic Committees. *Id.* at S4(b). Four members are appointed by the International Olympic Committees. *Id.* at Statute 4(c). Four members are appointed by the twelve members appointed by the International Federations, NOCs, and IOC with a view of safeguarding athletes’ interests. *Id.* at Statute 4(d). Four members are appointed by the other sixteen members. *Id.* at Statute 4(e).

controls.¹³⁶ The USADA Protocol, both the first version and the recent redraft, effective January 1, 2009, was drafted by USADA and USOC staff.¹³⁷ While the first version of the Protocol was presented to the USOC Athlete's Advisory Council, the recent redraft was not.¹³⁸ The Supplementary Procedures are modifications of the American Arbitration Association Commercial Arbitration rules.¹³⁹ The procedures govern the arbitration process and were drafted, presumptively, by the same people that drafted the Protocol, with little to no athlete involvement.

V. LAW OF ASSOCIATIONS

The legal relationship between athletes and sports governing bodies is routinely described as that of a voluntary association, and thus governed by the law of associations. CAS jurisprudence recognizes the relationship as a voluntary association, and therefore membership in the association is governed by the rules and bylaws of the association.¹⁴⁰ Further, CAS panels and domestic courts (here the courts of Switzerland and the United States) conclude that the voluntary nature of membership in such an association gives rise to a presumption that the member choosing to join has knowledge and understanding of the bylaws and terms to which she consents to be bound.¹⁴¹ Such Associations are considered independent, as their internal affairs and management are governed by the association's constitution and bylaws.¹⁴² Internal association decisions, including disciplinary proceedings

136. See USADA Protocol 2009, *supra* note 24, art. 3(d), at 3.

137. Telephone Interview with John Ruger, USOC Ombudsman (February 2009); see also USADA 2007 Annual Report, http://www.usantidoping.org/files/active/who/annual_report_2007.pdf.

138. Telephone Interview with John Ruger, USOC Ombudsman (March 2009).

139. See American Arbitration Association, Supplementary Procedures for the Arbitration of Olympic Sports Doping Disputes Rule 1, <http://www.adr.org/sp.asp?id=28627#1> (last visited Oct. 17, 2009) [hereinafter AAA Supplementary Procedures 2009]; see also Delanghe, *supra* note 15.

140. See Arbitration CAS 2005/A/830, Squizzato v. FINA, award of 15 July 2005, at 13; Arbitration CAS 2002/A/382, UCS v. RLVB, award of 24 June 2002, at 329.

141. See Arbitration CAS 2005/A/830, Squizzato v. FINA, at 13; Arbitration CAS 2002/A/382, UCS v. RLVB, at 329; Arbitration CAS 2005/A/847, H.Knauss v. FIS, award of 20 July 2005; Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978); Pharmacists & Retail Drug Store Emp. Union, Local 330 v. Lake Hills Drug Co., 255 F. Supp. 910 (W.D. Wash. 1964); Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956); NCAA v. Brinkworth, 680 So. 2d 1081 (Fla. Dist. Ct. App. 1996).

142. See, e.g. Tucker v. Nat'l Ass'n of Postal Supervisors, 790 N.E.2d 370, 374 (Ohio Mun. Ct. 2003) (holding that a court should not intervene in the private internal dispute of an association "unless there is a showing of fraud, arbitrariness, or collusion"); see also Ind. High Sch. Athletic Ass'n, Inc. v. Carlberg, 694 N.E.2d 222, 230 (Ind. 1997) (holding that a court will not intervene in a dispute between a state high school athletic association and a member school unless fraud or some other abuse of a civil or property right has occurred).

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

by the association against a member, are protected by a long standing judicial policy of non-inference, but for a few rare circumstances.¹⁴³

CAS panels, though given the authority to review de novo the disciplinary decisions of private associations, often limit themselves by applying the doctrines of association independence and non-interference in their review of doping decisions.¹⁴⁴ Panels will freely review the facts and the application of the association's rules to the facts, but they will not review or pass judgment on the rules of the association itself.¹⁴⁵ Therefore, the ultimate result of characterizing the legal relationship between athletes and sports governing bodies through the doctrines of the law of voluntary associations, is that athletes are powerless to challenge the rules made by the sports governing bodies. The governing rules are created without the input of athletes. Thus, the substantive and procedural rights afforded athletes are only those granted by the governing bodies and doping charges are viewed merely as breach of contract claims, and little more.

But is the fundamental assumption here correct? Is this a voluntary association? Do athletes voluntarily join these associations and voluntarily accept these rules? Can these legal fictions be sustained when: there is no alternative association to join, there is no bargaining, and there is no say in creating the rules of the association? Further, should the fiction continue when membership in the association is necessary for the athletes to earn a living at their chosen profession?¹⁴⁶ Ultimately, it must be asked, is a monopolistic sports association that regulates how and when athletes can earn a living a voluntary association in the traditional sense, or is it something more, and should the relationship between athletes and governing bodies be treated differently than a mere membership in a voluntary association?

VI. COMPARISON TO PROFESSIONAL DISCIPLINE AND QUASI-CRIMINAL

143. See Arbitration CAS 2005/A/830, Squizzato v. FINA, award of 15 July 2005.

144. See *supra* notes 142, 143.

145. See, e.g. USADA v. Jenkins, AAA No. 30 190 00199 07, at ¶ 108, 111 (2008).

146. The common reply to the point that athletes earn their living as athletes is that participation is a privilege or that athletes can just go out and get a "real job." In the modern sports world there has never been a more ridiculous argument than that common reply. Successful modern athletes must devote their entire life to training. It is a full-time job. It is like any other profession or job and should be treated as such. Not as a privilege, which is granted at the whim of the sports aristocracy. Athletes are equal partners in staging sporting shows and spectacles like the Olympics. They should be treated as equals, not serfs.

STANDARDS

What is the true nature of doping charges and doping proceedings? If they are not truly matters of contract law and the law of associations, what are they? The legal nature of doping charges is fundamental to determining the quantity and quality of procedural protections afforded defendants.

It is quite clear that doping charges are, at the least, disciplinary actions. Even a cursory comparison with other types of disciplinary actions—such as attorney discipline, medical discipline, military discipline, or educational discipline—shows that doping charges fall within the larger category of disciplinary law. Quite telling, the WADC has adopted a burden of proof in doping cases it describes as those used in professional discipline proceedings.¹⁴⁷ Though not widely recognized in the United States, European jurisprudence recognizes the separate and distinct body of disciplinary law.¹⁴⁸ All disciplinary actions are recognized as demanding more procedural protections than are accorded parties to a simple contract dispute.¹⁴⁹ But the quantity and quality of those protections varies depending on the closeness of the discipline to criminal matters.¹⁵⁰

In early CAS jurisprudence there was a debate over whether doping charges were quasi-criminal in nature.¹⁵¹ That debate, using the term quasi-criminal as a touchstone, was largely about the procedural rights of accused athletes.¹⁵² Once athletes were afforded basic procedural rights, the debate faded, and those arbitrators who characterized doping as a matter of the law of associations carried the day. The doctrine of non-interference was now used to defer to the rules of the associations and claims that proceedings were quasi-criminal were no longer made.¹⁵³ Unfortunately, during that short-lived debate, no tests or standards were adopted or created for determining whether doping charges were quasi-criminal.

147. See WADC 2009, *supra* note 29, art. 3.1 cmt., at 26.

148. See Mario Chiavario, *Principles of Criminal Procedure and Their Application in Disciplinary Proceedings*, 72 REVUE INTERNATIONALE DE DROIT PÉNAL 721 (2001).

149. See *id.* at 723-24.

150. See *id.* at 722-23.

151. CAS and AAA/CAS decisions finding doping matters to be quasi-criminal include: Arbitration CAS 2002/A/432, *Demetis v. FINA*; AAA-CAS No. 30 190 00291 03, *USADA v. Vencill*, award of 24 July 2003. CAS and AAA/CAS decisions finding doping matters to be non-criminal in nature include: CAS 98/208, *N.J.Y.W. v. FINA*, award of 22 Dec. 1998; AAA-CAS No. 30 190 00012 02, *Blackwelder v. USADA*, award of 17 May 2002.

152. See AAA-CAS No. 30 190 00012 02, *Blackwelder v. USADA*, award of 17 May 2002, at 8.

153. See Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 533 (2001).

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Surprisingly, there is a good deal of agreement between European and U.S. jurisprudence on the question of whether, and to what degree, criminal procedures should be made part of the disciplinary proceeding.¹⁵⁴ Both systems look to three factors: (1) the punitive nature of the punishment, (2) the effort to deter, and (3) the aim to protect the public.¹⁵⁵ The case law of the European Court of Human Rights requires that certain minimum guarantees found in Article 6 of the European Convention on Human Rights and Fundamental Freedoms be followed in disciplinary proceedings when the seriousness of the punishment and deterrence imposed equals criminal proceedings.¹⁵⁶

In the United States, disciplinary proceedings are considered criminal enough in character to necessitate enhanced procedural protections when: the accuser brings charges to protect the public, and the consequences sought are punitive.¹⁵⁷ Therefore, we must examine the nature, effect, and severity of doping punishments.

The punishment for committing a doping offense is much more than being suspended from or being kicked out of a voluntary association. Under the mandatory provisions of the WADC, the punishments that await an athlete upon finding of a doping violation are:

- (1) Suspension from competition two years to life.¹⁵⁸
- (2) Disqualification of results.¹⁵⁹
- (3) Repayment of prize money.¹⁶⁰
- (4) Suspension National Governing Body Financial Support.¹⁶¹
- (5) Ban from organized practices.¹⁶²
- (6) Fines.¹⁶³
- (7) Public Report of Punishment.¹⁶⁴

154. Compare *In Re Kindschi*, 319 P.2d 824 (Wash. 1958), with Daphne Boiten, Nico Jörg & Johannes Nijboer, *The Netherlands Principles of Criminal Procedure and Their Application in Disciplinary Proceedings*, 74 REVUE INTERNATIONALE DE DROIT PÉNAL 1007 (2003).

155. See *In Re Kindschi*, 319 P.2d at 825-26; Boiten, Jörg, Nijboer, *supra* note 154, at 1086-87.

156. See *id.* at 1085-86.

157. See *In Re Kindschi*, 319 P.2d at 825-26.

158. WADC 2009, *supra* note 29, art. 10.2, at 52.

159. *Id.* art. 10.1, at 52 (if the violation is in connection with an event).

160. *Id.* art. 10.8.1, at 71 (requiring an athlete to repay prize money forfeited under the WADC in order to be reinstated).

161. *Id.* art. 10.10.3, at 75.

162. *Id.* art. 10.10.1, at 74.

163. *Id.* art. 10.12, at 76.

The effect of these punishments for the athlete is that the athlete may not earn her livelihood in the profession for which she trained; she will lose any endorsement contract that she has; and, she will be suspended from her team and lose any salary associated with team membership. For all athletes, regardless of their level, punishment means permanent damage to their reputation and future earning ability.

These punishments are certainly punitive. Suspensions, fines, and the taking of financial support from National Governing Bodies are clearly designed to punish wrongful behavior. It is certainly more than the consequential damages approach to measuring contract damages. If the damages sought were consequential in nature, they would be limited to the disqualification of results, not future punishment. These punishments are designed to deter both the convicted athlete and other athletes. Convicted athletes are suspended and thereby deterred from doping for a period of time. Other athletes are deterred by the publication of convictions. Finally, the public is protected when (1) results are voided, (2) athletes are suspended and thereby kept from defrauding other athletes and fans, and (3) when the convictions are made public.

While the punishment for a doping offense under the WADC is severe enough to make the process criminal in nature, the possibility of actual criminal charges resulting from a doping charge further warrant enhanced procedural protections. The first risk of criminal charges comes from the possibility of testing positive in one of the growing number of countries that have criminalized the use or possession of prohibited substances.¹⁶⁵ Even though the WADC allows the doping prosecution to be carried out by the National Anti-Doping Organization of the athlete's home country, the WADC prosecution will not automatically replace or bar a criminal prosecution in the country of testing.¹⁶⁶ As long as the country of testing has jurisdiction and can either extradite the athlete or try the athlete in absentia, the athlete is at risk. Additionally, there is a risk that evidence developed during a WADC prosecution could find its way into the hands of criminal prosecutors of the athlete's home country.¹⁶⁷

164. USADA Protocol 2009, *supra* note 24, art. 16, at 14 (limited to after the violation has been confirmed through Protocol procedures).

165. Doping is now a crime in Italy, France, Austria, and China. See *Cyclist Arrested in Austria*, ESPN.COM, Mar. 20, 2009, available at <http://sports.espn.go.com/oly/cycling/news/story?id=4000571>; *Spain Won't Allow Use of Evidence*, ESPN.COM, Feb. 18, 2009, available at <http://sports.espn.go.com/oly/cycling/news/story?id=3916207>.

166. WADC 2009, *supra* note 29, art. 20.5, at 110.

167. It is possible that evidence obtained in an Olympic Movement doping investigation could be subpoenaed by prosecutors or voluntarily turned over to prosecutors by Olympic Movement

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The second risk of criminal prosecution could come from information sharing under the recent agreement between WADA and Interpol¹⁶⁸ or the sharing of information under the terms of the International Convention Against Doping in Sport.¹⁶⁹ All National Anti-Doping Organizations and National Governing Bodies are required to inform WADA about their doping prosecutions.¹⁷⁰ It is possible that WADA could pass such information on to Interpol or another country for investigation and prosecution. The provisions of the International Convention could obligate USADA to share information with governments that could prosecute athletes.¹⁷¹

Therefore, an analysis of the consequences of a doping charge shows that doping charges are not only disciplinary in their legal nature, but criminal enough in character to necessitate significant quasi-criminal procedural protections. The serious nature of doping charges and the need for the protective procedures of criminal proceedings can be most appreciated by looking at what happens to an athlete that is charged with a doping offense and later cleared. LaTasha Jenkins needed the protections of the criminal system to protect her from being punished, even though she was not found guilty.

VII. COMMERCIAL ARBITRATION MODEL

Does the current arbitration system used in doping cases work considering the true nature of doping charges? The current arbitration

investigators. But what is more alarming is the fact that Fourth and Fifth Amendment protections do not apply to the gathering of evidence in Olympic Movement doping investigations, since investigators are not state actors. However, the evidence could be admissible in criminal prosecutions because the evidence was gathered by a non-government official, and is thus good "evidentiary fruit" even if gathered in violation of constitutional protections.

168. See *Interpol, WADA Joins Forces to Fight Doping*, ESPN.COM, Feb. 2, 2009, available at <http://sports.espn.go.com/oly/news/story?id=3878934>.

169. See International Convention Against Doping in Sport, arts 3(c), 13, 14, 16(d), Oct. 19, 2005, UNESCO, available at <http://unesdoc.unesco.org/images/0014/001425m.pdf>; Michael Straubel, *The International Convention Against Doping in Sport: Is It the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?*, 19 MARQ. SPORTS L. REV. 63 (2008).

170. WADC 2009, *supra* note 29, art. 14.2.2, at 86 (requiring organizations who decide an anti-doping case to publically report the decision within twenty days).

171. See Straubel, *supra* note 169.

system is based on traditional commercial arbitration processes.¹⁷² USADA arbitrations are conducted according to the Supplementary Procedures, which are modifications of the American Arbitration Association's Rules for Commercial Arbitration.¹⁷³ The CAS Code of Sports-Related Arbitration is based on international commercial arbitration procedures.¹⁷⁴

A fundamental assumption that shapes commercial arbitration is that the disputes are between equal parties—parties with roughly equal resources and equal access to the evidence. This assumption grows, in part, from the nature of the dispute being settled. Contracts are presumed to be agreements based on mutual assent, entered into freely. Commercial arbitration grew up as a method for merchants to settle their disputes, and these merchants were viewed as equals.¹⁷⁵ Further evidence of this fundamental assumption can be seen in the procedures of commercial arbitration. The tradition of limiting discovery and requiring each party to pay the expenses of the arbitration assumes equal access to information and equal resources.¹⁷⁶

Even if the current arbitration system is not based on an assumption that the parties are equal in important ways, the system is unable to address the imbalance of power between governing bodies and athletes (given force in the substantive rules), the imbalance of resources, and the unequal access to the important evidence in doping cases. The commercial arbitration system is unable to address these imbalances because it accepts the principle of non-interference in the decisions of associations and thereby will not question the rules that it is enforcing.¹⁷⁷ In doping arbitrations, the rules that specifically perpetuate the imbalance of power which arbitrators will not question are: the presumption that sample collection and laboratory testing have been performed properly, and the accompanying burdens of proof for

172. See Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1206 (2005).

173. See AAA Supplementary Procedures 2004, *supra* note 46, at Rule 1.

174. CAS's parentage and its procedural rules can be traced to commercial dispute traditions; the International Olympic Committee working group that created CAS in 1983 modeled CAS after the leading commercial private dispute settlement systems of the time. See Court of Arbitration for Sport, in DIGEST OF CAS AWARDS II, 1998-2000 775 (Matthew Reeb ed., 2002); see Straubel, *supra* note 172.

175. See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 133 (1934).

176. American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures R-50 (2009), available at <http://www.adr.org> (follow the link to Arbitration, Commercial Rules) [hereinafter AAA Commercial Procedures] (stating that all expenses of the arbitration shall be borne equally by both sides, except the expense of party witnesses, which will be borne by that party).

177. See *supra* notes 144-46 and accompanying text.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

exoneration.¹⁷⁸ The system is then unable to address these imbalances because of the rules and traditions of limiting discovery. Limiting discovery is problematic when the most important evidence in a doping case is produced by the partners of the prosecution: the laboratories. The current system is also unable to address the power imbalances because of the tradition of eschewing rules of evidence.¹⁷⁹ Rules of evidence protect the reliability and quality of the evidence relied upon. Rules of evidence in doping cases would help protect against the use of unreliable science. Rules of evidence also would protect athletes from improper prejudicial evidence.

The commercial arbitration system did not work well in LaTasha's case. The system made it hard to obtain the necessary evidence, it failed to reach a conclusion promptly, and it failed to prevent an abusive and unsupportable appeal. The current system must abandon the commercial model and adopt a system that addresses these problems.

VIII. WHAT THE SYSTEM SHOULD LOOK LIKE?

If the current system is not working, how should it be changed to deal with the true nature of doping discipline? At the doctrinal level, the system must recognize the imbalance between governing bodies and athletes and take two large scale steps to address that imbalance. The first step is to abandon the doctrine of the law of association as the conceptual framework in which doping charges take place, replacing the law of association doctrines with disciplinary law doctrines. The second step is to adopt many of the procedures required in criminal proceedings.

In order to completely change the current system as suggested, both rules prescribed by WADA and procedures employed by CAS (and the AAA-CAS of North America) must be changed. Change by both WADA and CAS would have worldwide effect, as both agencies are international. Change, however, may be politically and practically difficult, if not a non-starter. Nevertheless, it may be possible to effect changes, particularly some of the more specific suggestions below, within the United States, hoping that others will follow the lead. Such changes would be permissible within the world system under Article 8.1 of the WADC, which recognizes that individual countries must be allowed to achieve the goals of the WADC

178. See *supra* notes 90-94 and accompanying text.

179. AAA Commercial Procedures, *supra* note 176, at Rule 31 (stating that conformity to "legal rules of evidence shall not be necessary").

within the workings of their own legal traditions.¹⁸⁰ Further, allowing the United States to implement some of its own particular measures, while remaining true to the objectives of the WADC, would be to recognize international comity and employ the well-recognized concept behind Directives in the European Union.¹⁸¹ The United States could achieve many of the changes through modifications to the rules of arbitration. Below are specific suggestions.

A. Arbitrators

Within the United States, a roster of fully dedicated arbitrators should be created with real input from athletes. A method should be developed to allow and obligate the arbitrators to devote themselves full-time to the cases, perhaps a retainer system or salary. The roster could be relatively small, to ensure expertise and economy. A random system of appointment should replace party selection. Finally, the arbitrators should follow the Model Code of Judicial Conduct.¹⁸²

B. Appeals

De novo appeals must be replaced with appeals on the record, and appropriate standards of review must be developed. The doctrines of res judicata, issue estoppel, and double jeopardy must be adopted. Strict time limits for completion of the appeal must be created and enforced.¹⁸³

C. Discovery

Rules permitting pre-hearing discovery must be developed that allow athletes to fully investigate their defenses. The prosecution, USADA or WADA, should not be allowed to make the rules of discovery nor shield potentially important information.¹⁸⁴ An obligation to disclose exculpatory

180. WADC 2009, *supra* note 29, art. 8.1, at 48.

181. See The Treaty Establishing the European Community art. 49, Mar. 25, 1957, available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding>.

182. The Model Code of Judicial Conduct seeks to ensure that judges in federal cases are neutral; the Canons regulate areas such as: Impartiality, Decorum, Integrity, Independence, Avoidance of Impropriety, Competence, and Diligence. Judges are required to act without bias or prejudice, and are forbidden from communicating ex parte with either party. Furthermore, they are required to recuse themselves if they ever acted as a lawyer in the matter before them, or have any economic interest in the issue before them. See generally MODEL CODE OF JUD. CONDUCT (2007).

183. In LaTasha's case, almost two months passed from the time of the first "award" to the filing of the appeal by WADA. See *supra* notes 78-79 and accompanying text.

184. See *supra* notes 119-26 and accompanying text.

[Vol. 10: 1, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

evidence should exist at all stages of the process.¹⁸⁵ WADA lab personnel should be permitted to testify on the behalf of athletes.

D. Evidence

A comprehensive code of evidence should be adopted, perhaps based on the Federal Rules of Evidence. Considering that criminal charges are possible, athletes should not be compelled to testify and their failure to testify should not be held against them.¹⁸⁶ Presumptions of compliance with International Standards should be done away with, and International Standards should be subject to challenge. The inclusion of a substance on the prohibited list should be open to challenge.¹⁸⁷

E. Process Management and Precedent

Time limits, for both the testing and investigation stage and the hearing stage should be created and enforced, except with the consent of the athlete. The doctrine of precedent should be fully adopted, and precedent made fully available to the public.¹⁸⁸ A system to reconcile inconsistent precedent should also be developed.

185. Currently there is no obligation to disclose exculpatory information. *See supra* note 115 and accompanying text.

186. This is a constitutional right, ensured by the Fifth Amendment of the U.S. Constitution, that a person accused of a crime is not required to testify in his own behalf. *See* U.S. Const. amend. V. Related to that issue, within standard criminal trial procedures, is the right of the accused to be free from the use of improper interrogations against him at trial. *See* Chiavario, *supra* note 148, at 4.

187. Challenges to the inclusion of a substance on the prohibited list could be limited to proof of the substance's ability to enhance performance. Such challenges are justifiable considering the number of times athletes have been punished for taking substances that were later taken off the prohibited list because later found to not be performance enhancing. *See* Too Little, Too Late for Lund, <http://www.vancouvergamesforum.com/tag/steroids> (last visited Oct. 17, 2009). The most famous of these cases is that of Zack Lund. *Id.* Lund had been taking the hair growth drug finasteride for several years before it was added to the prohibited list. *Id.* Because he was unaware that finasteride had been added to the prohibited list, he continued to take it and tested positive shortly before the 2006 Olympic Games in Turin. *Id.* A gold medal favorite in luge (one-man sled racing), Lund was suspended for a year and missed the Turin Games. *Id.* Two years later, WADA removed finasteride from the Prohibited List because it did not enhance performance or mask other prohibited substances. *Id.*

188. The Valparaiso University Sports Law Clinic has created and maintains an online database of available Olympic Movement arbitration decisions, which can be found at www.sportslawclinic.org. CAS does not currently publish all doping decisions; CAS and all doping arbitration bodies should be required to publish all decisions.

IX. BIG PICTURE REMEDY

The story of *USADA v. Jenkins* reveals a system created by a monopoly that wields power without sufficient restriction or balance. The system's current flaws can be addressed by adopting the above specific suggestions. However, as much as athletes would like to be optimistic, those suggestions are not likely to be adopted or sustained until the monopoly's powers are countervailed in one of three ways:

(1) The legal fiction that sustains the monopoly, namely the theory of voluntary association, is replaced with a legal doctrine that recognizes the monopolistic power of sports governing bodies; or

(2) An athletes' union with genuine bargaining power is organized, perhaps starting with United States based union organized under U.S. Labor Law; or

(3) A court finds that USADA (and potentially other National Anti-Doping Organizations) is a state actor and that participation in sports is a property right that can only be taken away through constitutionally restrained methods.