Discipline in Sports

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I. INTRODUCTION

During my time in the baseball industry, I have rendered some twenty-nine decisions and heard a number of other cases which the parties ultimately settled. My most famous baseball decisions involved the collusion cases, Collusion II and III, rendered in 1988 and 1990 respectively. The damage award flowing from the first of those cases was also rendered in 1990, and ultimately led to a $280 million settlement, the proceeds of which my predecessor, Thomas T. Roberts, has the lifetime job of parceling out to the players who were damaged. Possibly my most "infamous" award involved the Steve Howe case in 1992, wherein I found that Howe's lifetime ban from baseball by then Commissioner Fay Vincent lacked fundamental fairness and was without just cause.

Of the decisions I have rendered in baseball, four have dealt directly with discipline and the use of drugs by players. Another, though not disciplinary in nature, also related to substance abuse. These deci-

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* George Nicolau has been an arbitrator for basketball, indoor soccer, hockey and baseball. He also had the exalted title of Chairman of the Tri-Partite Arbitration Panel in baseball for nine years, from 1986 to 1995. Friends in that field have since dubbed him the "Cal Ripken of Chairmen." This article was originally presented at the New York State Bar Association Labor and Employment Law Section Annual Meeting on September 24, 1999 in Cooperstown, New York as part of a panel discussion with Eugene Orza, Associate General Counsel of the Major League Baseball Players Association and Robert D. Manfred, Jr., Executive Vice President of Major League Baseball.

5. See id. at 591.
sions ranged from a 1987 award involving a pitcher named Lamarr Hoyt and the 1992 Howe decision. In between these decisions were drug-related cases involving Otis Nixon and Gilberto Reyes, a catcher with Montreal. Each one of these cases was widely reported. In fact, the opinions I rendered were made available to the press. I therefore feel free to discuss them in this context.

All of these cases dealt with off-field conduct. In baseball, on-field conduct is essentially the responsibility of the Commissioner and, at least until recently when they disappeared, was also the responsibility of the president of each League. Normally, off-duty conduct is the business of the employer only under certain limited circumstances—when it can be shown by credible evidence that the conduct directly injures the product or reputation of the business, where fellow workers reasonably refuse to work with the alleged miscreant, where the behavior renders the employee unable to perform his duties or appear at work, like being in jail, or where the conduct clearly breaches an employee's duty of loyalty to the employer.

All of this, sometimes referred to as the "vital nexus" requirement, recognizes that employers are not the guardians of the public weal or the ultimate censor of their employees' off-premises behavior, nor are they society's chosen enforcers.

II. DISCIPLINE IN SPORTS CASES

Professional sports teams have long asked that they be considered differently from the ordinary employer. In 1980, when a 23-year old player with a guaranteed contract was suspended without pay only hours after his arrest for possible possession of a controlled substance and forcible sexual abuse, the argument that injury to the enterprise must be

6. See In re Major League Baseball Players Ass'n v. San Diego Padres Baseball Club, Panel Decision No. 74, 548 Ple/PAT 623 (1987) (Nicolau, Arb.) [hereinafter Hoyt Arbitration]. The action against Hoyt was claimed to be a contract breach, but ultimately deemed disciplinary. See id. at 654.
7. See Howe Arbitration, supra note 4, at 553 (discussing the case involving Otis Nixon).
8. See id. at 554 (discussing the case involving Gilberto Reyes).
10. See generally Phillips v. Bergland, 586 F.2d 1007, 1011 (4th Cir. 1978) (discussing the distinction between off-duty conduct and conduct occurring at work). This concept of discipline for off-duty misconduct was argued by the San Diego Padres in the Hoyt arbitration. See Hoyt Arbitration, supra note 6, at 648.
11. See id.
looked at differently in professional sports was put to me this way:

This recognized exception [to the proposition that off-duty misconduct is not the business of the employer] must be applied here, not in an ordinary industrial setting, but in the context of professional sports and personal service contracts. [The player], like all other players, made certain promises with respect to off-court behavior... promises grounded in the “athlete-as-hero” phenomenon, which the Club characterizes as a “cornerstone of the professional sports business, essential not only because its “good for business,” but because it is intertwined with the integrity that is basic to the survival of all professional sports leagues.\textsuperscript{12}

I held in that case that the Club had “engaged in unsustainable action” when “only a few hours after [the player’s arrest] and without adequate investigation, [it] decided to deprive him of his salary solely on the basis of alleged criminal conduct on the grounds that such measures were necessary to forestall unproven economic consequences.”

In the course of that opinion, I said:

The “athlete-as-hero” phenomenon on which the Club relies is not a sufficient base upon which to build a contrary principle. Some, thinking of George Herman Ruth, as well as other players of more recent vintage in that and other sports, may consider this phenomenon a myth. Others may not. But whether it is a true principle or a cherished myth to which we, for various reasons, cling, is not the point. The point is that, absent “integrity of the sport” issues or proof of guilt, it cannot serve as a substitute for persuasive evidence that the Club’s action was reasonably necessary to prevent some adverse consequences to its business affairs.

This was at a time when the Players Association, in that case, characterized it as “an era when players are no longer expected to present a socially neutral or non-controversial image.” How far we have come.

Some may take comfort in looking at players in professional sports as heroes or role models, but I have always seen them as human beings, blessed with phenomenal physical abilities yet subject to the same fears, faults and failings as the rest of us. They should therefore be judged by

\textsuperscript{12} The aforementioned arbitration was not released to the public and the author wishes not to identify the parties.
the same standards as would be applied to ordinary mortals. I have al-
ways believed that employers of these athletes should be held to the
same standard as other employers—prudent, responsible decision-
making considerate of all the circumstances.

My decision in the Hoyt case in 1987 should therefore have come
as no surprise to those in professional sports. Lamarr Hoyt, a pitcher for
the San Diego Padres, was a Cy Young Award winner, but a troubled
young man. He was stopped as he walked across the Mexican/United
States border during the off-season with over 300 pills of Valium, a
Schedule IV Controlled Substance and approximately 200 Prop-
oxphene, a muscle relaxant/pain killer that is a Schedule II Controlled
Substance. These drugs were all stuffed in his trousers. He had ob-
tained these drugs on prior occasions by prescription, but not this time.
His plea bargain to two misdemeanor counts called for a sixty day sen-
tence. The federal magistrate, after reading a detailed psychiatrist’s re-
port, reduced the sentence to forty-five days on the grounds that it was
all the case was worth.

Shortly after Hoyt began serving his sentence, the Club terminated
his guaranteed contract, which had three years to run. After he com-
pleted his sentence, Commissioner Peter Ueberroth banned him from
baseball for the 1987 season.

In Hoyt, the Club and the Commissioner argued that their actions
were justified because a player, such as Hoyt, had to be a “major role
model for the youth of America.” I rescinded the contract termination
primarily because the Club had failed to follow its own drug policy pro-
cedures and acted in haste without a careful consideration of all the cir-
cumstances. I also reduced the Commissioner’s season-long ban to
sixty days beginning with the first day of the 1987 season, finding a
season-long ban grossly inconsistent with the Commissioner’s prior de-
terminations, as well as a series of arbitration awards rendered by

13. See Hoyt Arbitration, supra note 6, at 625.
14. See id. at 639.
15. See id. at 633-34.
16. See id. at 625-26.
17. See id. at 626.
18. See Hoyt Arbitration, supra note 6, at 643.
19. See id. at 643.
20. Id. at 648.
21. See id. at 654-55.
22. See id. at 669.
23. See Hoyt Arbitration, supra note 6, at 661.
Richard Bloch,24 another of my distinguished predecessors. I did not address the “duplicative discipline” issue in Hoyt.25 There may be substance to the argument that no duplicative discipline was actually involved in the case because there were different interests involved.26 Nevertheless, I found no need to answer it in that case, and because I may have to answer it some day, it is best that I do not answer it now.

The Commissioner’s determinations of which I spoke in Hoyt emanated from the 1985 Pittsburgh Drug Trials, in which seven players admitted profound involvement with cocaine and the facilitation of the distribution of cocaine in baseball.27 Though the Commissioner, in early 1986, had imposed season-long bans for that prolonged pattern of drug use, he also offered to forego the suspensions if each player performed one hundred hours of community service in two years, contributed ten percent of his base salary and agreed to random drug testing.28 All of those players chose the alternative.29 A few other players, who were also implicated in those trials, were not as heavily involved with drugs.30 As a consequence, they were suspended for sixty days rather than a full season.31 They too were offered an alternative to their suspensions: a “donation” of five percent of their salary for the next year and fifty hours of community service.32 They also accepted the alternative.33 Thus, not one of the players involved in this prolonged pattern of drug use in-season ever served a single day of suspension. Hoyt, who was not experimenting with cocaine, but was abusing drugs obtainable by prescription, a very different circumstance, was offered no such alternative.

The cases I referred to in the Hoyt decision were the arbitration awards stemming from Commissioner Bowie Kuhn’s 1983 decisions in the Kansas City cases.34 In those cases, Willie Mays Aikens, Willie Wil-

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24. See id. at 665-68.
25. See id. at 660-61. It was argued by the Major League Baseball Players Association that the decisions of the San Diego Padres and the Commissioner “seek to discipline Hoyt for the same conduct and thus constitute a form of double jeopardy or duplicative discipline.” Id.
26. See id. at 661.
27. See id. at 662-63.
28. See Hoyt Arbitration, supra note 6, at 663.
29. See id.
30. See id. at 663.
31. See id.
32. See id.
33. See Hoyt Arbitration, supra note 6, at 663.
34. See id. at 664.
son, and Jerry Martin admitted to repeated cocaine use. All except Wilson admitted to using drugs during the season, Aikens and Martin admitted buying cocaine in the stadium parking lot. As first offenders, they all were sentenced to a year in prison, nine months of which were suspended. Commissioner Kuhn also banned them from baseball for the 1984 season. Chairman Richard Bloch reduced the ban to forty-four days, finding that the interests of corrective discipline had been served by their prison terms and a suspension of that length. A fourth player, Vida Blue, was subsequently suspended by Kuhn for a longer period of one hundred days. Bloch upheld that suspension, characterizing Blue's involvement with cocaine as "active, widespread... continuous" and "substantially more serious" than that of the other players, with a suspension of that length accordingly justified.

While stating that "[a]bsolute consistency [was] not possible or necessarily a virtue" in disciplinary matters, I had no hesitancy, on my review of the facts including prior instances of discipline in baseball, in finding that Hoyt's conduct, "when compared to the more egregious conduct of others, did not justify a suspension for a full season," and that a suspension comparable to the second tier of Pittsburgh offenders, sixty days, was appropriate.

Otis Nixon, whose case came before me in 1991, was a two-time cocaine offender. Both incidents occurred during the season; one in the minor leagues and the other during the latter phases of a torrid major league pennant race. Fay Vincent, who was the Commissioner by then, suspended Nixon for sixty days, and the Players Association filed a grievance. Nixon's suspension had come near the end of the season and was to spill over into eighteen days of the next. The Players Asso-

35. See id.
36. See id.
37. See id.
38. See Hoyt Arbitration, supra note 6, at 664.
39. See id. at 665.
40. See id. at 665-66.
41. Id. at 666.
42. Id. at 667.
43. Hoyt Arbitration, supra note 6, at 668.
44. See id.
45. See Howe Arbitration, supra note 4, at 553.
46. See id.
47. See id.
48. See id. (noting that during the 1991 season, Nixon had entered a drug treatment center, he served the first forty-two days of his suspension and was to serve the remaining eighteen days.
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Association asked that I reduce the suspension by those eighteen days. They argued that, since Nixon had successfully completed an intensive inpatient treatment program, medical testimony showed that if Nixon were required to serve them it would be “therapeutically counterproductive.” I refused, finding that Commissioner Vincent’s decision was within the reasonable range normally recognized by the governing standards and that a reasonable penalty should not depend on the time in the season the offense occurred.

Incidentally, in Nixon and in Howe, the Commissioner challenged consideration of post-discharge medical evidence, saying that I should only consider the facts available at the time he made the decision. I disagreed because it was determined long ago that it was not unusual to consider medical evidence when the severity of discipline was under review; therefore it is appropriate to consider the circumstances surrounding an event for mitigating significance. In my decision to take such evidence as announced at the hearing—evincing shades of things to come of which neither Commissioner Vincent nor I were then aware—I said I would take such evidence “if a player were banned [from baseball] for life and saw no reason why it should not be considered even when the penalty was less severe.”

I will not dwell on the Reyes case. It is sufficient to explain that this was yet another case in which a Club’s conduct, namely, an almost cavalier treatment of a player as well as repeated failures to inform the Commissioner’s office of critical information, called for the rejection of the sixty day penalty and treatment of Mr. Reyes, in accord with baseball’s drug policy, as a first offender entitled to rehabilitation rather than discipline.

This brings us to the Howe case. Much has been written of this decision, most of it inaccurate, primarily because those commenting about the decision never actually read it. One author, in commenting on my

in the beginning of the 1992 season).

49. See id.
50. Howe Arbitration, supra note 4, at 553.
51. See id.
52. See id. at 577.
53. See id. at 584.
54. Id. at 584-85.
55. “The last disciplinary drug case to come before the Panel . . . involve[d] Gilberto Reyes, a catcher then with the Montreal Expos.” Howe Arbitration, supra note 4, at 554.
56. See id. at 554 (stating that the suspension of Reyes “was set aside, and, in lieu thereof, in-patient treatment as a first offender was ordered”).
decision, opined that “athletes who fail to perform their best in contests that fans pay to attend destroy the game’s integrity.” If he thought he was talking about Steve Howe, he obviously had never seen him play.

In any event, Howe had a terrible record of substance abuse, with both alcohol and cocaine. His abuse of alcohol was furthered by “well-meaning” folks in baseball who thought greater use of alcohol would reduce his need for cocaine. Most commentators claim that he was suspended seven or eight times. This is not true. In most instances, Howe removed himself from the roster so he could go into treatment. He had, in fact, gone to treatment six times without success. In 1990, after being out of baseball for two years, he implored Commissioner Vincent to give him another chance.

After having Howe examined and interviewed by psychiatrists, Vincent agreed to allow Howe to return to baseball on March 10, 1990, with specified conditions. The conditions were that he play in the minor leagues for the 1990 season, and not return to the major leagues until 1991; and that he participate in an aftercare program that Vincent would approve, with drug testing implemented “possibly every other day.” A positive test result would be cause for Howe’s immediate removal from professional baseball.

These latter conditions—testing every other day and banishment in the event of a positive test—were not only the result of the urging of a psychiatrist who had examined Howe; these were conditions that Howe had brought up and urged as vitally needed for his survival. Thus, by Vincent’s decision of incorporating those conditions, the Commissioner’s office assumed responsibility for the drug testing and aftercare.

One of the difficulties in the Howe case was that the need for testing of that frequency, both during the in-season and the off-season, was never communicated to the testing facility or ever actually imple-
It just didn’t happen. The Commissioner’s office also did not formally consider or approve an aftercare program. Despite this neglect, Howe was free of drugs during the 1990 and 1991 seasons and, as far as we know, was free of substance use when he was not playing baseball.

While with the New York Yankees in 1991, Howe, during his first season back, compiled from May 1991 until an injury on August 10, 1991 a 1.68 ERA in 37 games. However, in December 1991, while home in Montana he attempted to buy some cocaine from an individual, who was a police informant and was charged with possession. On June 8, 1992, Howe pled guilty to a misdemeanor attempt to possess charge. Commissioner Vincent indefinitely suspended him that day, and on July 24, 1992, converted his suspension to a lifetime ban. Vincent asserted that Howe had violated his “last chance agreement” and had “squandered” his opportunity to remain in the game. Vincent also determined that an imposition of a lifetime ban served baseball’s institutional interests, which had to prevail. Furthermore, there was “simply no alternative” to his decision, because “Baseball had done all that [could] be done for Howe.”

On the record that was before me, I found otherwise. I asked the respected psychiatrists who testified if they could jointly select neutral physicians and psychiatrists who would examine Howe and after studying all of the available medical records they would give me: (1) an evaluation and diagnosis of Howe; and (2) their professional opinion as to the adequacy of prior diagnoses and treatment. They agreed and selected Dr. Herbert D. Kleber, Director of the Division of Substance Abuse at Columbia University’s College of Physicians and Surgeons, and Dr. Paul H. Wender from the University of Utah, one of the country’s foremost experts on Attention Deficient Hyperactive Disorder.
I asked for these evaluations and opinions because it had been suggested in the hearing that Howe might be afflicted with an underlying and undiagnosed ADHD, which, if true, "could make recovery from substance abuse virtually impossible if left untreated."

Both physicians confirmed that this was indeed the case; that the condition had never been diagnosed or treated despite Howe's several hospitalizations. This affliction served, in large measure, to explain the events of his life.

Given that medical evidence, which the Commissioner's office knew I would consider since I had said as much in the Nixon decision, as well as what baseball had failed to do during Howe's career in the 1980s and upon his return in 1990, it was my judgment that baseball, contrary to the Commissioner's assertions, had not done all it could for Howe, and therefore the lifetime ban could not stand.

Of course, the consideration of after-acquired medical evidence is not new in the workplace. In baseball, it went back to 1971 when Chairman Lewis Gill reinstated Alex Johnson, whose failure to give his best efforts was not due to an act of will, as the Club thought, but a severe reactive depression. And, of course, consideration of the propriety of a penalty is not new either. Just cause contains two elements: (1) whether the player actually committed the offense charged; and (2) if

78. See id. at 574.
79. Id. at 572-73.
80. See id. at 574-75.
81. See Howe Arbitration, supra note 4, at 574-77. Dr. Wender concluded that Howe exhibited clear-cut symptoms of ADHD which "had continued to manifest them[selves] in [Howe's] adult life." Id. at 574. Dr. Kleber, while disagreeing with Dr. Wender's findings regarding Howe's risk of relapse and risks associated with medication, nonetheless agreed with Dr. Wender's diagnosis of ADHD. See id. at 575.
82. See id. at 584 (stating that "after acquired evidence, including medical evidence, should be considered when weighing the appropriateness of a particular penalty, whether that evidence be mitigating or aggravating").
83. See id. at 574-75.
84. See id. at 586 (noting that baseball never "diagnosed or treated" Howe's underlying psychiatric disorder, which was "a contributing factor to his use of drugs."). Additionally, baseball failed to heed the warning of the Commissioner's medical advisor that Howe be tested every other day for the duration of his career. See id. at 587.
85. See id. at 585; see also, e.g., Mantolete v. Bolger, 767 F.2d 1416, 1425 (9th Cir. 1985) (upholding the admissibility of after-acquired evidence of a medical condition in handicap discrimination cases).
86. See Howe Arbitration, supra note 4, at 585; see also Pollack, supra note 57, at 1663. During the 1970 season, the California Angels suspended Alex Johnson for his "lackadaisical play." Id. However, Arbitrator Lewis Gill overturned the suspension finding that Johnson was "emotionally ill." Id.
the player did commit the offense he is charged with, whether the imposed penalty is appropriate. 87 I found that Howe had indeed committed the act for which he was charged, but, given all the circumstances, the penalty was fundamentally unfair. 88

That decision, which reviewed baseball's policies, all of the prior drug decisions and Howe's life and treatment in great detail, was followed by an award spelling out, also in great detail, the essential elements of an aftercare testing and treatment program that would be a part of any contract Howe would sign as long as he played in organized baseball. 89 That testing and treatment program was followed by Howe, at his own expense, through the remainder of his career and even after his career had ended. 90 Though Vincent was upset that his decision had not withstood just cause scrutiny, in my judgment the facts compelled the conclusion.

III. CONCLUSION

As I explained earlier, employers of athletes should be held to the same standard as other employers—prudent, responsible decision-making considerate of all the circumstances. Some may say that I have held the Commissioner to a higher standard than that of an ordinary employer. The fact is that a Commissioner is not an employer, at least of players or managers, even though some Commissioners think they are. As stated in Howe:

[w]hat bears repeating . . . is that the Commissioner does not stand in the isolated position of an individual employer. He can bar the employment of a player at any level of the game regardless of the opinion or wishes of any one of a great number of potential employers. That is an awesome power. With it comes a heavy responsibility, especially when that power is

87. See generally Howe Arbitration, supra note 4, at 650-55 (discussing the just cause standard).
88. See id. at 591-94 ("[F]undamental fairness requires that [Howe's] permanent expulsion be set aside, [but] only with his understanding and acceptance of responsibility will his future truly be secure.").
89. See id. at 543-44. Among other things, the award provided for: a treatment and aftercare program; mandatory drug testing every other day, during both the season and off-season; psychiatric care associated with the treatment of ADHD-RT; and formal relapse prevention training. See id.
90. See id. at 592-94.
exercised unilaterally and not as the result of a collectively bargained agreement as to the level of sanctions to be imposed for particular actions.91

Finally, a critic of my decision in Howe and a decision of John Feerick, my good friend, in a well known basketball case, has used our awards as examples of why "Commissioners need unappealable disciplinary authority to protect the integrity of their sports."92 The same critic suggests that unions must trust that Commissioners will impose just discipline.93

He should be reminded that arbitrators now render these decisions for the very reason that Commissioners had made them before sports unions were strong enough to obtain impartial arbitration. When a Commissioner took action, a player had the right to file an appeal.94 The difficulty was that the appeal was to the Commissioner—the very person who had made the decision in the first place.95 Baseball achieved arbitration in 1970,96 and when hockey players enjoyed the benefit of arbitration in 1993,97 I had the honor to be the first impartial Chair. Through the occupants of those impartial chairs change, I venture to say that both sides are generally satisfied with the process.

As to the trusting of unilateral and unreviewable authority of the Commissioner, which my critic avidly seeks, I also remind him that a number of players, including Captain Don Mattingly, came forward as character witnesses for Steve Howe to speak not of his considerable ef-

91. Id. at 588-89.
92. Pollack, supra note 57, at 1706-9; see also In re National Basketball Players Ass'n et al., Opinion and Award 11-12, 548 FPL&PAR 429, 531 (1998) (Feerick, Arb.) [hereinafter Sprewell Arbitration] (noting that it is the Commissioner's duty, as the spokesperson of the league, is to be accountable for protecting the league's integrity).
93. See Pollack, supra note 57, at 1709-11.
94. See Frederick N. Donegan, Examining the Role of Arbitration in Professional Baseball, 1 SPORTS L.J. 183, 195 (1994).
95. See Marc Chaplin, It Ain't Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball, 60 ALB. L. REV. 205, 217 (1996) ("In 1968, the First Basic Agreement established a grievance procedure, making the Commissioner the ultimate arbitrator of any grievance...") (internal quotations omitted) (quoting Thomas J. Hopkins, Arbitration: A Major League Effect on Players Salaries, 2 SETON HALL J. SPORTS L. 301, 307 (1992)).
96. See id. ("In 1970, the Second Basic Agreement [of the Major League Baseball Players Association] was reached, and grievances could [now] be sent to an independent panel of arbitrators outside the Commissioner's office.").
97. See Stephen J. Bartlett, Contract Negotiations and Salary Arbitration in the NHL... An Agent's View, 4 MARQ. SPORTS L.J. 1, 10 (1993) ("The 1992-93 season was the first year contracts were arbitrated under the new rules.").
fectiveness as a pitcher, but of his competitive spirit, his dedication and the positive impact his presence had on the entire team. Also coming forward that day were three non-players: the Yankee manager, Buck Showalter, the General Manager, Gene Michael, and John Lawn, a Yankee vice president who had recently retired as President Reagan’s head of the United States Drug Enforcement Agency.\textsuperscript{98} Each of them, in direct examination, had spoken highly of Howe and articulated what his spirit had brought to the team.\textsuperscript{99} Each was also asked by the Commissioner’s counsel on cross-examination what they thought of Baseball’s drug policy as it related to Howe.\textsuperscript{100} All expressed varying degrees of misgiving or uncertainty as to what the Commissioner had done.\textsuperscript{101}

The morning of the very next day, on which the Yankee’s were to play a day game starting at 1:00 p.m., Vincent ordered them to appear before him at 11:00 a.m.\textsuperscript{102} He then separately ordered the three into his office,\textsuperscript{103} and as the press dutifully reported, bluntly stated that through their testimony, they all had effectively resigned from baseball.\textsuperscript{104}

So much for where trust should reside.

\textsuperscript{98} See generally \textit{John Helyar, Lords of the Realm: The Real History of Baseball}, 498 (1994) (“[T]hree members of the Yankees management—manager Buck Showalter, GM Gene Michael, and a vice president named Jack Lawn—[were asked] to be character witnesses for Howe.”).

\textsuperscript{99} See id.

\textsuperscript{100} See id.

\textsuperscript{101} See id. at 498-99.

\textsuperscript{102} See id. at 499.

\textsuperscript{103} See id., supra note 98, at 501-04.

\textsuperscript{104} See id.; see also Susan H. Seabury, \textit{The Development and Role of Free Agency in Major League Baseball}, 15 GA. ST. U. L. REV. 335, 366 n.320 (1998) (“Vincent effectively told Yankee’s manager Buck Showalter, General Manager Gene Michael, and Yankee’s vice president Jack Lawn that by testifying on Howe’s behalf, they had violated their agreement with baseball and would be disciplined, even going so far as to tell them they were out of baseball.”).