

THE CENTER FOR SPORTS LAW AND POLICY  
*Duke University School of Law*

*The Duke Conference on Doping*

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*The Necessary Components of an Anti-Doping Agency or Program*

On May 7 and 8, 1999, the Duke Center for Sports Law and Policy hosted the Duke Conference on Doping in Sport. The objectives of the conference included the gathering together of experts and leaders from the world of sport to discuss the principal problems implicated by doping, and to develop a summary of the necessary components of a proper anti-doping agency or program. The group met both in plenary and break-out sessions. The break-out sessions were specifically designed to facilitate discussion of such an agency or program's structural, scientific, and legal components. What follows is a summary description of those components.

*I. The Necessary Structural Components of an Anti-Doping Agency or Program*

- A. Externalization is necessary and should be put into effect immediately. Functions to externalize include:
  - 1. selection of athletes to be tested
  - 2. sample collection
  - 3. sample analysis
  - 4. reporting of analytical results
  - 5. screening of results and referral (or not) to adjudication
  - 6. adjudication
  - 7. possibility of externalization of sanctions should be studied. Sanctions should remain with the NGB, but a potential conflict of interest involves NGBs sanctioning their star athletes too lightly, in which case rectification by an independent agency might become necessary.
- B. The Canadian Model looks very good in the current international context and is a model to which future programs can aspire.
- C. Educational activities should remain with the USOC and the NGBs.

- D. Public health concerns should be a top priority, and all governments should do a better job in this area. Effective doping control requires public health education about doping in order to attract public support and funding.
- E. The USOC should recognize that it has an image and credibility problem in the international community and must make strenuous efforts to rectify the situation, by means of externalization, for the sake of the anti-doping effort and the integrity of Olympic and amateurs sports as a whole.
- F. The Court of Arbitration for Sport is still too entangled with the IOC and should be located somewhere other than Lausanne.
  - 1. It should be supported by truly independent funding.
  - 2. It should have a Charter of Principles to guides its adjudications.
  - 3. It should provide access to counsel for athletes.
  - 4. It should include people possessing relevant scientific expertise.
  - 5. All of its panels should adopt regularized procedures and report out both judgments and the reasons for those judgments.
- G. The independent international anti-doping agency or program should make research, standards, and models a top priority.
  - 1. It should develop minimum standards that are expressed in a protocol for determining which substances are placed on the banned substances list and for revising testing procedures.
  - 2. It should recognize different physiological standards for males and females.
  - 3. It should include a government liaison with an intelligence-gathering capacity for collecting information about doping practices, drug trafficking, and the behavior of coaches and others who have access to high-performance athletes.

*II. The Necessary Scientific Policy Components of an Anti-Doping Agency or Program*

- A. The objective of any anti-doping program should be to eradicate the use of drugs in sport.
  - 1. The use of drugs in sport is unethical.
  - 2. The use of drugs in sport in some instances is detrimental to the health and well being of the athlete.
  
- B. This objective must be approached from two perspectives.
  - 1. The society must subscribe to a program of prevention through values and health-based education.
  - 2. The society must subscribe to a program of deterrence and punishment through a strong drug testing program.
  
- C. The following are essential with respect to the program of prevention through values and health-based education.
  - 1. It should focus on the public health aspects of drug use, including both psychological/ethical and physical health.
  - 2. It should be built into the sports system at its origins. Understanding the importance of training and competing with integrity, and of long-term physical and ethical health cannot be accomplished with rhetoric and billboards directed at mature athletes.
  - 3. It should be designed to counteract the negative commercial messages that encourage athletes to do drugs. For example, it must counteract the message that sport supplements are not only acceptable but desirable; and the message that the only place that counts is first place.
  - 4. It is the responsibility of every adult who is involved with athletes, including parents, teachers, coaches, sports governing bodies, commercial enterprises that sponsor sporting events, and local and national government.
  
- D. The following are essential with respect to the drug testing program:
  - 1. It must be comprehensive and national/international. Harmonized drug testing in all sports is essential. Children and athletes must not get mixed

messages depending upon the sport about whether drugs are or are not acceptable.

2. It must be scientifically sound. Peer-reviewed research must exist to back-up the tests that are conducted. The tests must be designed to achieve a low-to-nonexistent rate of false positives.
3. Prosecutions must be brought only on strong evidence of guilt. They must be backed-up by peer-reviewed research, the sample's chain of custody must be intact and thoroughly documented, and the athlete must be presented with a complete packet of forensic information on the sample.
4. The laboratories/scientists that conduct the relevant research and the sample analyses must be independent of the sports governing bodies. The existing IOC laboratories are a good beginning, and the group supports their evolution toward independence; however, the following additional measures must be implemented:
  - (a) The laboratories must become completely independent.
  - (b) They must permit outside audits of all of their operations, including of the development of the underlying science, their relationships, and forensic toxicology.
  - (c) All of their procedures must meet the standard established by the International Standards Organization (ISO), and with respect to the analytical work, the ISO standards should be forensic rather than clinical.
  - (d) They must allow their research to be peer-reviewed, and because they continue to lack certain critical expertise, this research must be complemented by that of independent scientists in relevant fields.
5. There must be an independent oversight board charged with the supervision of the drug testing program, including of the laboratories and research, that is comprised of outside qualified experts in the fields of science, law, and public policy.
6. The list of banned substances must be compiled based upon the reasons for doping control, i.e., protecting the public health and preventing unethical competition. The list should include endogenous substances that are proven in accordance with accepted procedures and protocols to be

ergogenic aids and/or detrimental to the public health. However, cases must not be brought based on an endogenous substance unless there is a test for that substance that is scientifically sound and validated in accordance with accepted procedures and protocols.

### *III. The Necessary Legal Components of an Anti-Doping Agency or Program*

- A. The adjudication process should be entirely independent of the governing bodies.
  - 1. The governing bodies should have an educational role, informing athletes of the dangers of doping and of the ethical foundation of sports.
  - 2. National governing bodies should not be placed in an adversarial role vis a vis their athletes in doping cases.
- B. The adjudicatory process must include the following safeguards:
  - 1. Prosecutions will be based on scientifically determined violations.
  - 2. All prohibited substances must be detectable in the athlete's urine or body fluids through a method that is scientifically valid.
  - 3. All prohibited substances must be banned on the basis of research that takes into consideration such relevant factors as ethnicity, age, gender, and medical history.
- C. The adjudicatory process should proceed in three distinct stages.
  - 1. Stage 1. There should be a preliminary review by a panel composed of relevant experts, including physicians, other scientists, and lawyers.
    - a. The purpose of this review is to determine if all procedures were followed for the collection, storage, transportation, and testing of the athlete's sample **and** if, based on the laboratory report, the results of the analysis are sufficiently strong evidence of the athlete's guilt.
    - b. During this preliminary stage of the proceedings, the identity of the athlete is held strictly confidential.
    - c. If the review panel finds that the published mandatory procedures for the collection, storage, transportation, and testing of the sample

were not strictly followed, it must declare the sample invalid and end the process.

- d. If the review panel determines that the collection, storage, transportation, and testing of the sample complied fully with the rules, and that the analysis provides sufficiently strong evidence of the athlete's guilt, it will forward the case for prosecution. At that point, there may be a rebuttable presumption of the athlete's guilt.
- e. The independent anti-doping agency or program will be responsible for the prosecution of all doping cases.
- f. The review panel will make periodic public reports of the number of cases dismissed in this manner, and the basis for each dismissal. The names of the athletes involved will not be disclosed.

2. Stage 2. The determination of whether a doping violation took place must be decided by qualified decision makers.

- a. There currently are two possible models, neither of which in its present form would satisfy the requirements for inclusion in the new process. Each model has advantages and disadvantages.
  - (1) The first is the American Arbitration Association (AAA).
    - One of the advantages of AAA is its familiarity and suitability for emergency disputes.
  - (2) The second is the International Court of Arbitration for Sport (CAS).
    - One of the advantages of CAS is its potential international acceptance, and thus potential for finality.
- b. One of the most important criterion for the body ultimately selected to decide the merits of cases is the employment of adjudicators with experience deciding contested scientific disputes.
- c. There must be regularized procedures for all hearing panels.
  - (1) Panels must publish all decisions, and the bases for the

decisions.

- (2) If CAS is used, it would have to establish regional panels to streamline the process.
- d. There must be a process for providing counsel to athletes accused of a doping violation.
- (1) This might be accomplished through a Judge Advocate General-type structure, which would provide both the prosecutors and the defense counsel, under the direction of an independent overseer.
  - (2) Another possibility is the reliance on pro bono counsel.
  - (3) A third possibility is the use of an approved list of counsel.
  - (4) In the end, some combination of these three might be employed.
- e. One issue left unresolved was at what point an athlete should be suspended.
- (1) There was agreement that liability should not attach before a suspicious sample was confirmed by a second analysis of the sample.
  - (2) There was some support for this confirming analysis being done by a different laboratory than the one that performed the initial analysis.
  - (3) There also was support for the athlete's early involvement in the preliminary stage of the process, to raise limited compliance issues before the review panel. There was not agreement about whether this would constitute a hearing for purposes of the Amateur Sports Act, which bars a suspension prior to a hearing.
- f. There was agreement that an athlete's certification of the sample collection procedures could be used against him or her in a contested hearing, although the athlete still could challenge the collection.

- (1) For this reason, one of the important functions of the national governing body would be the education of its athletes in the process and their rights under the program.
3. Stage 3. The final stage of the process involves proceedings in the athlete's national courts or before international federations.
  - a. There was agreement that a credible and bona fide arbitration process as outlined above would result in minimizing the role of civil courts.
    - (1) Either party court seek confirmation of the administrative decision, and thus largely protect the arbitration decision and the underlying dispute from further court scrutiny.
  - b. There was agreement on the need for harmonization among the rules of the various federations to which an athlete might be subject.
    - (2) Any obligation that a national governing body had for doping disputes under the rules of its international federation would have to be delegated to the independent doping agency.
      - Thus, a sample tested outside the United States would be subject to the same preliminary compliance review that a sample generated in the United States would receive.
      - And the failure to follow the requirements for the collection, storage, transportation, and testing of the sample by the foreign entity would result in the sample being declared invalid.