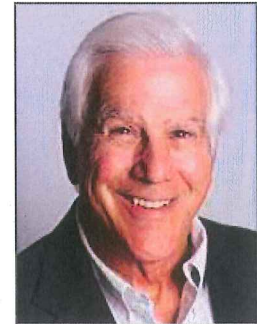


Will WADA Learn From Due Process Mistake?

By Ronald Katz

When, to great fanfare, the World Anti-Doping Agency issued its final report on Russian doping last December with 1,166 pieces of evidence, few questioned the absence of due process that barred from Olympic and Paralympic competition hundreds of athletes against whom nothing had been proven. One of the few critiques of that absence came from me, in Law360 on Dec. 15, 2016: **"1,166 Pieces Of Evidence And No Due Process."**

Now that the report has unilaterally condemned Russia for systemic doping without a hearing, however, the individual cases that are the responsibility of the various sports organizations — e.g., the International Association of Athletics Federations (IAAF) for track and field — have just started to be publicized.



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The results clearly show why due process makes a huge difference. Of the first 96 cases publicized, 95 of the athletes have been cleared by WADA of wrongdoing. No athletes who participated in the Sochi Olympics — the focus of the report — have had their medals rescinded.

These results are not surprising. First, the report depended mainly on an informer whose credibility had previously been questioned by a WADA report and who had fled Russia and was in hiding in the U.S. Second, Russia did not participate in the process that created the report, so its side of the story was not factored into the results. Third, the author of the report played the role of the investigator, the judge and the jury in his report, a combination of roles that historically has not worked to generate fair results. Fourth, it does not really matter whether there was systematic state-sponsored doping — what matters is whether individual athletes doped. The bottom line is that individuals are responsible for their conduct, and those that did not dope in the face of state pressure should be praised, not punished.

Defending the report was WADA's director general, Olivier Niggli, who was quoted as stating, "We have to accept the fact that [the report's] purpose was to prove a system, not individual violations." This statement, however, presents the unlikely situation that there was an extensive system of cheating but no cheaters.

Director General Niggli, however, has not given up on the idea that there were and are unproven cheaters. He stated, "There might have been more evidence out there in Russia for sure, but there was a limit to what he [the WADA investigator] was able to get." But clearly that evidence was not procured. Therefore, one has to question why the report was issued with evidence inadequate to justify the devastating remedy of barring innocent athletes from competing in Olympic events for which they had spent many years training.

What was stated in the report last December related to the issue of individual guilt is that "[t]he different types of evidence provided with respect to any individual athlete are like strands in a cable," which may or may not "standing alone or together, build a sufficiently strong cable." It is hard to disagree with this statement theoretically. The problem, however, is that the report had a very practical, not theoretical, result: the banning of hundreds of athletes without regard to their guilt.

What, then, should have happened before anyone was banned? That is an easy question to answer, because there is both a tradition of hundreds of years of due process in the civilized world and a well-established WADA system for punishing cheaters.

Due process requires that there be an adversarial hearing before someone is punished, and that the burden of proof is on the prosecutor. By the terms of the report itself, however, no athletes were proven guilty, yet hundreds were punished. Russia, of course, did not participate in the process and was condemned in absentia, an absence for which the athletes were punished.

Worse yet, WADA's well-established procedures were ignored. WADA requires extensive drug testing and has a process to make determinations whether athletes are cheating. That process is then appealable to the Court of Arbitration for Sport, also a well-established and respected body. Following its own procedures is obviously what WADA should have done in order to prevent the absolutely worst result — the punishment of the innocent.

That result was not prevented in 95 out of the first 96 cases. Hopefully that embarrassing and unjust result will spur WADA to follow its own procedures and to afford athletes due process in the future.

In order to completely clear the air, WADA would also be well-advised to clean up its conflicts of interest. The person heading WADA, for example, is also a member of the International Olympic Committee, the events of which WADA is supposed to police.

The International Olympic Committee also provides funding for WADA. Clearly WADA's funding should be provided by entities in a way that does not call the impartiality of WADA into question.

Also, the international sporting authorities like the IAAF have to create structures that insure independent judging of alleged doping violations. Having independent adjudicators within those organizations will avoid the pressure that the sporting organizations have to promote their sports.

It is too late to undo the injustice done to the 95 athletes that WADA has now belatedly cleared. It is also too late to undo the chaos that a rush to justice before the Rio Olympics caused. It is not too late, however to implement a system with the cardinal principle that only those who have been proven guilty of doping will be punished for doping.

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