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# NFL General Counsel Adolpho Birch *speaks* on the NFL's Drug Policy

**A**dolpho Birch currently serves as Counsel for Labor Relations for the National Football League, which is headquartered in New York, New York. In that capacity, his primary responsibility is the enforcement of the League's Collective Bargaining Agreement, which encompasses issues ranging from player grievances to salary cap disputes to the League's policies on conduct and performance-enhancing drugs.

Prior to joining the NFL, Mr. Birch was in private practice in Houston, Texas, initially with Fulbright & Jaworski's Antitrust/Complex Litigation group and later with a boutique firm specializing in labor, insurance defense and municipal finance. Preceding his firm affiliations, he served as judicial law clerk to the Honorable Thomas A. Wiseman, Jr., Chief Judge of the U.S. District Court for the Middle District of Tennessee.

Mr. Birch attended Vanderbilt University Law School as a Patricia Roberts Harris Scholar, serving on the Editorial Board of the Vanderbilt Law Review and earning his juris doctorate in 1991. He did his undergraduate work at Harvard University, where he graduated with honors in Government and was a member of the lacrosse and basketball teams, Kappa Alpha Psi Fraternity and several student organizations. On a personal note, Mr. Birch was raised in Nashville, is 35 years old, and is actively involved in a number of professional and philanthropic organizations. JELP spoke with Mr. Birch on August 20, 2002.

**JELP:** *What are the main facets of the league's substance abuse program?*

**BIRCH:** First of all we have two different programs. We have a program for substances of abuse, which are generally street drugs like cocaine and marijuana.

Alcohol is included in that. And we also have a policy on performance-enhancing substances, which involve anabolic steroids, masking agents, stimulants, diuretics and similar substances. Nutritional supplements. Things along those lines. Under the substance abuse program, the primary goal is intervention and treatment. That is reflected both in how we test and the types of discipline that we mete out for violations of that policy. Under the policy on anabolic steroids, the first goal is to ensure the competitive integrity of the game; the second goal is to prevent the adverse health effects related the use of those types of substances; and the third would be to protect the league in terms of its role-model obligations with respect to the youth who are particularly vulnerable to things that they see NFL players doing.

**JELP:** *The current policy is a revision of part of the CBA from 1993, correct?*

**BIRCH:** Steroid testing began in '89. We went to random testing in '91 and once we signed onto the new CBA, the formal policy that we now have really began in '93.

**JELP:** *What are the players' concerns and how are they addressed in the policy?*

**BIRCH:** Historically, the Players Association was as interested in establishing a policy as we were because they understood, rightly, that first and foremost it affects the integrity of the game and ultimately the game itself will suffer if there are not sufficient checks in place to prevent even the perception that the game is not fair. The second thing is that they also saw the

negative health effects and it was very important to them to put in a policy so that players who did not want to use those kinds of substances didn't feel like they were pressured to use them in order to keep pace with someone else. So it was to prevent those coercive effects that they were certainly as agreeable to the policy as we were. Their chief concern is probably the confidentiality of the process and proceed-

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ings. And they are certainly concerned with making sure that the discipline is fair and the requirements are not necessarily so onerous that they make it too difficult for a player to comply. Fortunately, we have settled on what we think works and it has been very effective so far.

**JELP:** *It seems that the NFL has disciplinary standards that are automatic and more uniform, compared to some leagues where the commissioner is given more discretion. Is that perception correct? If so, what do you think are the advantages of the way you are doing it as compared to Major League Baseball or the NBA?*

**BIRCH:** Our standards are set in stone and frankly I think that's the best way to do it. The Commissioner obviously has discretion to alter the discipline, but it is not the type of discretion that is used lightly. It is better in our view to have a defined system with delineated consequences that occur from the use of a prohibited substance. For example, a positive test for a performance-enhancing substance nets a four-game suspension without pay. That is the rule for a first violation and everybody knows it. And when it happens to you, you will be treated the same way as other players were. So the players, I think, while they may not necessarily want it to be that severe, are appreciative of the fact that it doesn't matter whether you are the last guy on the bench or whether you are an All-Pro. If it happens, that's the punishment and you have to accept it and move on. When you have a great deal

of discretion, it at least opens the door for a perception that some players are treated differently based on their status or other factors that are not germane to the issue. So from our standpoint, I think it is a more workable system but I certainly understand how different leagues come to different conclusions.

**JELP:** *Given those parameters, is there any way that the NFL would face a situation like Major League Baseball did when Steve Howe's suspension went to independent arbitration and then was overruled?*

**BIRCH:** No. We've had a few players over time attempt to go outside of our process, but that method has been rejected by the courts. I believe Clayton Holmes was the most well-known case. In that instance the courts summarily held that our substance abuse policies were part of our collective bargaining agreement and under our constitution and bylaws he had to fit within that system rather than attempt to go outside of it.

**JELP:** *There have been suggestions in the media and in legal journals that professional sports leagues are protecting their players from harsher punishment because of their policies on drug use. How do you respond to that?*

**BIRCH:** Well, I think that's incorrect because ordinarily if there is a violation of criminal law, we take action in addition to what the court does. So, for example, if you have a player that has a Driving While Intoxicated charge, he's going to face whatever he faces in court *plus* he's going to face League discipline (a fine and/or suspension without pay, as well as entry into the substance abuse testing and treatment program) for a violation of a law involving alcohol. Moreover, under League policy, discipline will accrue not simply upon conviction but upon any disposition or plea arrangement other than outright dismissal. I think that for the most part our policies and programs go beyond the vast majority of companies out there, particularly those with unionized workforces. We do more in terms of our testing. We do more in terms of treatment, we do more in terms of getting treatment and we do more in terms of discipline than would happen to the average Joe on the street whose company had some sort of testing program.

**JELP:** *How do the National Labor Relations Act and the collective bargaining process effect and shape the way that you approach these kinds of policies? What can you do and what can't you do because of that relationship?*

**BIRCH:** Well, for us, we're in a period of labor peace, so we're operating under our CBA which we've just extended again. So, primarily, we're not in a position in which we have to review the Act on a daily basis. We understand the parameters of our policies and our Collective Bargaining Agreement and we're in a position now in which we can work with the Union when issues come up and address them within the confines of our world, so to speak. It makes it a lot easier. Now it's more of a negotiation process that usually leads a collective decision, or at least a collective process to figure out what's best for the game. An example is our decision to ban ephedrine last year. That was the product of a joint effort to uncover what the issues were with respect to that substance and to generate information. That information led us to the conclusion that we needed to ban that particular substance and some others, and move on. It didn't require an abundance of legal work. It really was just a decision regarding what was in the best interest of the game.

**JELP:** *What do you do as far as the drug policy in a situation like Korey Stringer's death?*

**BIRCH:** Well, obviously Korey's situation was a tragedy for the League, but it certainly had an effect on us in terms of reviewing a lot of our procedures particularly in terms of our training camp procedures. And it also, frankly, had some bearing on our decision to ban those stimulants because we know that a lot of players, and I'm certainly not speaking about Korey in particular, were using supplements containing things like ephedrine in order to lose weight before training camp, and that those supplements likely contributed to some potentially serious medical risks. As part of that comprehensive review, one of the things we thought we needed to do was to make sure that those types of substances were effectively removed from the game.

**JELP:** *What would a player have to do to be reinstated after having been suspended indefinitely?*

**BIRCH:** Under the substance abuse program, once a player has been suspended indefinitely, he is eligible to apply for reinstatement after a given period of time. And the determination is ultimately the Commissioner's as to whether or not to accept that reinstatement. That decision is based on a number of factors including the player's treatment history during the period of suspension, etc. Our medical advisors review the pertinent information and advise on the propriety of that particular player returning to the League and being able to avoid further trouble.

**JELP:** *What effect does a player's suspension have on the team's roster and their salary cap figures?*

**BIRCH:** When a player is suspended, he is essentially completely removed from the team. He can't go to the facilities. He can't watch film. He can't talk to the coaches. He can't do anything. Most importantly from his perspective, he does not get paid. For example, if it is a one-week suspension, then he is barred from the facility for that week and does not receive a paycheck for that week's game. (NFL Players are paid by the game based on a 16-game schedule.) Because of that, clubs are not penalized from a salary cap standpoint when a player is suspended. That player's salary cap number attributable to the period of his suspension

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drops off the team's cap count. He goes into another category so that the club can fill his roster spot with another player. The point is not to make the team go short-handed. It is to remove that particular player from play.

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**JELP:** *How does the League work with colleges and high schools to promote its policies?*

**BIRCH:** Well, we do a number of things. We speak to colleges. We speak to high schools. We have set up programs involving high school coaches that get them to begin teaching the principles that we think are important from our standpoint. We also have various initiatives with the NCAA and some of the coaches' associations to try to make sure that the NFL's position is very clear because we do think that college athletes and even high school and junior high school athletes look to the League as the leader in the athletic sphere. So it is very important to make sure that our message is very clearly heard. We do everything we can to ensure that, if there are any questions or any issues that arise, we address them as far down the chain as we can.

**JELP:** *So when a player comes from college is he going to have to make any adjustment to abide by your policy or will he already know the ropes?*

**BIRCH:** Well, the NCAA's testing policy is very similar to ours. So in terms of substances, they should be fairly familiar with the types of things that will cause problems from a testing standpoint. However, there are differences in the amount of testing that we do versus the NCAA and there are certainly differences from the standpoint that you are now not simply dealing with the removal from play. You're dealing with the loss of income. We certainly let them know that it is a different situation now and that they need to be careful. The cornerstone of our policy is that you are responsible for what goes into your body.

**JELP:** *How about agents or attorneys? What kind of education do you provide for them?*

**BIRCH:** We do numerous things throughout the year. We have health alerts that we send out when we get information about particular substances or other health-related issues. Obviously we communicate with the agents as best we can. As a general rule, everything we send goes to the union as well; they then send it to the agents. Obviously, we both recognize that agents have a critical role in helping to educate the players and need to be kept in the loop. So we try to get them involved. We also speak at the agent's meeting every year at our scouting combine and update them

on issues that have arisen under our policies.

**JELP:** *Do you have any working relationship with criminal law enforcement, and if so, what is that relationship?*

**BIRCH:** Yes, in a way. One of the things I handle is the League's conduct policy. When issues arise, I interact with law enforcement as appropriate. We have a highly-trained security department that deals with these matters on a day-to-day basis and they'll report things that I need to know to me and then I'll handle them from the disciplinary standpoint. We also have an evaluation and treatment component under that policy. Depending on the circumstances, there are several people who work on different areas and we coordinate with law enforcement and others to keep the policy on track.

**JELP:** *Is there any civil recourse for a player affected by the discipline within the collective bargaining agreement?*

**BIRCH:** As they used to say, \$120 and a signature will get you a lawsuit, but in real terms we operate under a collective bargaining agreement. The players have signed off on it. It's part of the NFL player contract. We've all agreed to operate within that system for a reason. It would be a fairly ineffective system if you were able to pick and choose when to be within it and when to be outside of it. Our position certainly is that the CBA was drafted through intense negotiation and that the players as a bargaining unit agreed on how to handle these issues.

**JELP:** *So that's really their legal world?*

**BIRCH:** Right.

**JELP:** *What are the key things that have enabled the NFL's policies to evolve as they have?*

**BIRCH:** I think it's our history. I think we were faced with a situation in which the players and League were able to come together and agree that the abuse of drugs and performance-enhancing substances was a problem that needed to be addressed. And once we arrived at that collective thought, the details of it were not very difficult.

*A copy of the NFL's press release regarding their drug policies is on the following page.*



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## **NFL BANS EPHEDRINE AND OTHER HIGH-RISK STIMULANTS**

The NFL notified its clubs today that the league's prohibition on the use of anabolic steroids and related substances has been strengthened to include supplements containing ephedrine and other high-risk stimulants. These substances present significant health issues for athletes and others engaged in strenuous physical activity, the NFL said.

In a memo to NFL teams, Commissioner **PAUL TAGLIABUE** said that, effective immediately, the use or distribution by players or teams of products containing ephedrine or similar substances is prohibited. He said the additional policies and procedures were based on consultation with both internal and external specialists and the NFL Players Association.

Testing and discipline for violations of the expanded policy will begin following further discussion internally and with the NFLPA, Commissioner Tagliabue said.

"This strengthening of our policy responds to the recent introduction of new substances, as well as new evidence addressing the risks associated with certain products already on the market," Commissioner Tagliabue said.

The strengthened policy includes three key provisions:

1. The use or distribution of products containing the following high-risk stimulants is prohibited:
  - Ephedrine alkaloids, including ephedra and ephedrine (also known as Ma Huang, Bishop's Tea, and Chi Powder), methylephedrine, norephedrine (also known as phenylpropanolamine), pseudoephedrine, and norpseudoephedrine
  - Phentermine
  - Fenfluramine/dexfenfluramine

Club employees are prohibited from distributing to players, or having on club premises, any product containing these substances. Players are prohibited from using such substances unless prescribed for medical use by a team physician.

2. NFL clubs and players are prohibited from participation in any unauthorized endorsement arrangements with supplement manufacturers or distributors. Approval will not be granted for an endorsement involving any company that produces or markets a product containing a substance that is on the NFL's banned list. Players or teams that have an existing arrangement with a supplement manufacturer or distributor must take immediate steps to determine whether it complies with NFL policy.
3. All clubs must communicate these policies and procedures to all club employees and representatives, including players.

Commissioner Tagliabue noted that there has been a dramatic increase in recent years in the production and distribution of products claiming to enhance athletic performance or physical fitness.

If they choose, he said, manufacturers can market so-called "dietary supplements" without any prior governmental review for safety, efficacy or purity. In other words, there is no way to be certain that these types of products are safe and effective or that they contain the exact ingredients listed on their labels, the Commissioner said. Some of

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these products, he added, contain prohibited substances and present significant health risks to athletes.

“One example is the proliferation of products containing ephedrine,” Commissioner Tagliabue said. “This stimulant, which is often found in products advertised for weight loss and enhanced energy, has become increasingly popular among both professional and amateur athletes. Last December, players and clubs were alerted to the risks of ephedrine in a notice from **DR. JOHN LOMBARDO**—NFL Advisor on Anabolic Steroids. He advised that, particularly with regard to athletes, there is growing evidence linking ephedrine to fatal heart rhythm difficulties, strokes, thermo-regulatory problems, seizures and other serious conditions. Organizations such as the NCAA and IOC have already added ephedrine and other stimulants to their banned lists.”

Prior to the opening of NFL training camps in July, the NFL and NFL Players Association set up the NFL Dietary Supplement Hotline to provide information to players and teams on these substances and dietary supplements in general. The Hotline makes available to NFL personnel up-to-date information on the ingredients, effects and adverse reactions associated with particular supplements.