



Kentucky Bar Association Annual Convention

MORE THAN A LAWYER

Lexington, Kentucky  June 13-15, 2018

SPOTLIGHT CLE: THE NCAA AND REPRESENTING STUDENT ATHLETES

CLE Credit: 1.0
Friday, June 15, 2018
11:20 a.m. - 12:20 p.m.
Bluegrass Ballroom II
Lexington Convention Center
Lexington, Kentucky

A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

**Printed by: Evolution Creative Solutions
7107 Shona Drive
Cincinnati, Ohio 45237**

Kentucky Bar Association

TABLE OF CONTENTS

The Presenters	i
Representing NCAA Student Athletes	1
Representing NCAA Coaches and Athletic Administrators in the NCAA Infractions Program: Summary	15
Representing NCAA Coaches and Athletic Administrators in the NCAA Infractions Program.....	17

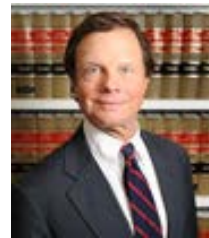
THE PRESENTERS



Matt H. Jones
Kentucky Sports Radio
Louisville, Kentucky

MATT H. JONES is the founder and host of Kentucky Sports Radio (KSR) and Hey Kentucky. He is a graduate of Transylvania University and received his J.D. from Duke University School of Law.

Thomas W. Miller
Miller Griffin & Marks, PSC
600 Security Trust Building
271 West Short Street
Lexington, Kentucky 40507-6676



THOMAS W. MILLER joined Miller Griffin & Marks, PSC in 1973 after graduating with the highest distinction from the University of Kentucky College of Law. He was also elected to the *Order of the Coif*, and served on the *Kentucky Law Journal*. Mr. Miller is largely engaged in trial and commercial practice and is a frequent lecturer and author on equine and evidence issues. He is licensed to practice in Kentucky, Tennessee and Oklahoma.



C. James Zeszutek
Dinsmore & Shohl
One Oxford Centre
301 Grant Street, Suite 2800
Pittsburgh, Pennsylvania 15219

C. JAMES ZESZUTEK is the former managing partner of Dinsmore & Shohl's Pittsburgh office. He concentrates his practice in the areas of product liability, tort, mass tort, toxic tort and pharmaceutical and medical devices. Mr. Zeszutek also has an active NCAA practice in which he represents coaches in hearings before the Committee on Infractions, defending against allegations of NCAA bylaw violations and has been involved in the Committee on Infractions hearings involving numerous universities and colleges. He received his B.S. and M.P.A. from Syracuse University and his J.D. from the Syracuse University College of Law. Mr. Zeszutek is a member of the Allegheny County, Pennsylvania, West Virginia and Ohio Bar Associations, Defense Research Institute, and the Edgar Allen Founders Society of Easter Seals. He serves on the board of directors of the Syracuse University Athletic Development Advisory Board and on the Board of Advisors of the Syracuse University College of Law.

REPRESENTING NCAA STUDENT ATHLETES

Thomas W. Miller and Elizabeth C. Woodford

I. **PAXTON V. UNIVERSITY OF KENTUCKY: A CASE STUDY ON THE DUE PROCESS ISSUES IMPLICATED IN REPRESENTING STUDENT-ATHLETES IN NCAA ELIGIBILITY AND DISCIPLINARY DETERMINATIONS**

- A. James Paxton was a full-scholarship University of Kentucky baseball player with a 3.5 GPA and no history of disciplinary action. After his junior year, he was drafted in the first round by the Toronto Blue Jays.
- B. UK received notice from the NCAA that it wanted to interview Paxton, but refused to disclose the reason or the questions that might be asked. The NCAA communicated only with UK, not Paxton, and directed UK to inform him not to tell his parents or anyone else in advance. UK informed Paxton that, if he refused to attend the interview, he could keep his scholarship and practice with the team, but could not play.
- C. NCAA Restitution Rule:

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: *(Revised: 4/26/01 effective 8/1/01, 11/1/07 effective 8/1/08)*

(a) Require that individual records and performances achieved during participation by such ineligible student athlete shall be vacated or stricken;

(b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

(c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;

(d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;

(e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;

(f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;

(g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;

(h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and

(i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.

Source:

<https://web3.ncaa.org/lstdbi/search/bylawView?id=102242>.

- D. There was never an allegation by the NCAA that Paxton was or should be declared "ineligible," and his official status throughout the dispute remained "eligible."
- E. Probable reason for the NCAA's interview request: A blog post by Robert MacLeod quoted Paul Beeston, president of the Blue Jays, as saying that the team could not sign Paxton because it refused to pay the amount demanded. Beeston implied that Scott Boras had acted as Paxton's agent and had interacted directly with Beeston and that, as to Boras's clients, "the way you deal you deal through him." The NCAA never contacted Beeston or Boras.

Presumably, the NCAA intended to investigate Paxton for violation of the "no-agent" rule:

Bylaw 12.3.1 General Rule: An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport

Bylaw 12.3.2 Legal Counsel. Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the individual in negotiations for such a contract.

Bylaw 12.3.2.1 Presence of a Lawyer at Negotiations. A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.

- F. The Dilemma
 - 1. The NCAA requires universities to certify eligibility. (Bylaw 14.10.1). If UK gets it wrong, however, its record (and its coaches' records) may be affected under the Restitution Rule. UK told Paxton he could not play in team games unless he participated in the interview.

2. But if Paxton submitted to the interview, he could face a suspension for some unknown period of time – which would cause him to have a less favorable draft position, and, consequently, a loss of or reduction in a signing bonus. This, despite UK informing him that it was not aware of any allegations against him or any evidence of wrongdoing by him.
3. Efforts to reach some kind of resolution, or even an explanation of potential sanctions, were rejected by the NCAA.

G. *Paxton v. University of Kentucky*

1. A student-athlete has no direct right of action against the NCAA. *National Collegiate Athletic Ass'n v. Lasege*, 53 S.W.3d 77 (Ky. 2001) (Court has no authority to direct the NCAA to determine a student to be eligible to participate in intercollegiate athletics).
2. Therefore, Paxton asserted a breach of contract claim.
 - a. UK has adopted a Code of Student Conduct that extends important rights to students. In fact, the purpose of the code is to extend to all students "basic rights," and by its express terms, it applies to "any activity sponsored, conducted or authorized" by UK. The code states that exclusion of a student from an extracurricular activity is a disciplinary measure, and that discipline cannot be imposed with due process, which includes, at a minimum:
 - i. Being informed of the charges in writing;
 - ii. Not being compelled to testify against oneself; and
 - iii. A hearing.
 - b. UK admitted that baseball is an extracurricular activity.
 - c. A student code creates an implied contract between an educational institution and its students. *Stathis v. University of Kentucky*, 2005 WL 1125240 (Ky. App.

May 13, 2005). And, in Kentucky, contracts include implied covenants of good faith and fair dealing.

3. Paxton also asserted a claim under Section 2 of the Kentucky Constitution, which protects against arbitrary and capricious conduct. Kentucky courts have recognized that a student may have a viable claim against a public school if he or she is arbitrarily excluded from an activity. *Critchelow v. Breckinridge County Bd. of Educ.*, 2006 WL 3456658 (Ky. App. Dec. 1, 2006). In *Critchelow*, the student was not permitted to participate in interscholastic athletics. The court rejected a claim under 42 U.S.C. §1983 because it found there was no vested or fundamental right to participate in the activity. However, the court found that the student did state a viable claim that the school had acted arbitrarily and capriciously, and remanded for further proceedings. See also *Board of Education v. Bentley*, 383 S.W.2d 667 (Ky. 1964) (a regulation requiring married students to withdraw from high school was unconstitutional).
4. Paxton moved for a temporary and permanent injunction.
5. Circuit Court: Following a lengthy hearing and testimony from Paxton, his baseball coach, Sandy Bell, Mitch Barnhart, and an expert who confirmed that no NCAA member institution had ever been sanctioned due to a student's refusal to attend an interview, the court made findings of fact and conclusions of law in denying the request for an injunction.
 - a. Findings of fact: The court found that Paxton was a student in good standing, that the NCAA had failed to identify to Paxton or to UK any issues that might affect his eligibility, that Paxton was deemed eligible by UK, and that UK would not allow Paxton to play unless he sat for the interview with the NCAA.
 - b. Conclusions of law: Despite those findings, the court held that there was no violation of the student code because it did not define extracurricular activities to include baseball, and that the code applied only to "safety issues."
6. Court of Appeals (on CR 65.07 motion): Adopted the circuit court's findings and concluded, "Mr. Paxton is asking this Court . . . to give him the benefit of a student code hearing

for the purpose of determining his NCAA eligibility and that is clearly not anything the student code hearing can address."

II. THE STUDENT-ATHLETE'S (RELATIVELY NONEXISTANT) RIGHT TO FREE SPEECH

- A. Although students' First Amendment rights are not necessarily coextensive with those of adults in other settings, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).
- B. Student athletes, however, are subject to more restrictions than the student body at large. As one court explained:

This greater degree of oversight is due to the differing natures of the classroom and playing field. One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower. Of course, students may participate in extracurricular sports for any number of reasons: to develop discipline, to experience comradery and bonding with other students, for the sheer "love of the game," etc. Athletic programs may also produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal . . . The plays and strategies are seldom up for debate. Execution of the coach's will is paramount.

Lowery v. Euverard, 497 F.3d 584, 588 (6th Cir. 2007) (internal citations omitted).

- C. Student-athletes' First Amendment challenges are rarely successful.
 - 1. *Marcum v. Dahl*, 658 F.2d 731, 735 (10th Cir. 1981): University of Oklahoma women's basketball players made a First Amendment challenge to the loss of their scholarships in alleged retaliation for criticizing the head coach. The court rejected the claim: "The problems created by the controversy between the scholarship and non-scholarship players were internal problems with which the defendants were required to

deal in their official capacities. Such matters are not of general public concern and the plaintiffs' comments to the press did not invoke First Amendment protection."

2. *Lowery, supra*: The court held that it was reasonable for high school officials to believe that a petition circulated among the school's football team members stating "I hate [the coach] and I don't want to play for him" would disrupt the team by eroding the coach's authority and dividing the players into opposing camps, and so officials did not violate students' First Amendment free speech right by removing them from the football team.
3. *Green v. Sandy*, 2011 WL 4688639 (E.D. Ky. Oct. 3, 2011). A soccer player alleged that ECU removed her from the women's soccer team in retaliation for exercising her First Amendment right to free speech when she expressed concerns to school officials about her coach's handling of internal team matters. The court held that she did not establish a violation of any constitutional rights. Further,

Schools and coaches are not obligated to wait until a student-athlete's complaints actually disrupt a team before taking action, nor are they required to actually demonstrate it was certain the complaints would create disruption. Rather, school and coaches must show it was reasonable for them to forecast that the complaints at issue would disrupt the team. Thus, questions of whether disruption actually occurred or whether the school could actually prove disruption are not questions that prevent dismissal as a matter of law.

Id. at *6 (citation omitted).

D. NCAA rules on player speech:

1. Bylaw 12.5.3 – Media Activities:

[A] A student-athlete may participate in media activities, including but not limited to, radio, television and internet-based programs (e.g., coaches' shows), and writing projects when the student-athlete's appearance or participation is

related in any way to his or her status as a student-athlete. The student-athlete shall not receive any remuneration for participation in the activity. The student-athlete shall not make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive actual and necessary expenses directly related to the appearance or participation in the activity. A student-athlete participating in such media activities may not miss class, except for class time missed in conjunction with away-from-home competition or to participate in an NCAA or conference-sponsored media activity. *(Revised: 1/16/93, 1/14/ 97, 1/9/06, 4/27/06, 1/20/17, effective 8/1/17)*

2. Bylaw 2.4 The Principle of Sportsmanship and Ethical Conduct:

For intercollegiate athletics to promote the character development of participants, to enhance the integrity of higher education and to promote civility in society, student-athletes, coaches, and all others associated with these athletics programs and events should adhere to such fundamental values as respect, fairness, civility, honesty and responsibility. These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics program. It is the responsibility of each institution to: *(Adopted: 1/9/96)*

(a) Establish policies for sportsmanship and ethical conduct in intercollegiate athletics consistent with the educational mission and goals of the institution; and

(b) Educate, on a continuing basis, all constituencies about the policies in Constitution 2.4-(a).

3. Application.

- a. The Enforcement Committee has declined to impose a blanket obligation on institutions to monitor student-athletes' social media accounts, but has cautioned:

Consistent with the duty to monitor other information outside the campus setting (beyond on-campus activities such as countable athletically related activities, financial aid, satisfactory progress, etc.), such sites should be part of the monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information on a site. For example, there exists no inherent duty of institutions to monitor the purchase of clothes by student-athletes. However, if an institution obtains information that a student-athlete's clothes are being purchased by a booster, and if that student-athlete is seen wearing new and expensive clothes, a duty to investigate the student-athlete's clothing purchases would arise . . .

. . .

The same is true with social networking sites; if the institution receives information regarding potential rules violations, and if it is reasonable to believe that a review of otherwise publically available social networking information may yield clues to the violations, this committee will conclude that the duty to monitor extended to the social networking site.

The committee recognizes that social networking sites are a preferred method of communication in present society, particularly so among college-age individuals. While we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an

institution's heightened awareness when it has or should have a reasonable suspicion of rules violations. If the membership desires that the duty to monitor social networking sites extend further than we state here, the matter is best dealt with through NCAA legislation.

University of North Carolina, Chapel Hill, *Public Infractions Report*, March 12, 2012.

- b. In response, many institutions have adopted social media policies specific to student-athletes. One study polled 83 universities with Division I programs and asked to see documents pertaining to the regulation of student-athletes' social medial accounts. Of the schools surveyed, at least 59 individual departments restricted student-athletes' use of social media. Rex Santus, "Colleges Monitor, Restrict Athletes on Social Media," *American Journalism Review*, March 26, 2014.

III. STUDENT-ATHLETES' RIGHT OF PUBLICITY

A. NCAA Rules

- 1. The NCAA's rules authorize it to use the student-athlete's name or picture "to generally promote NCAA championships." NCAA Bylaw 12.5.1.8.
- 2. NCAA Bylaw 12.5.1.1: An institution (or educational or nonprofit agency) is permitted to use "a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics," provided that certain conditions are met, including, among other things, (i) that all moneys derived from the activity or project go directly to the institution or nonprofit agency, (ii) the student-athlete's name, picture or appearance is not used to promote the commercial ventures of any nonprofit agency, and (iii) the student-athlete's name, likeness, or pictures may be sold only at the member institution where the student-athlete is enrolled, but items that include a student-athlete's name, picture or likeness other than informational items (e.g., media guide, schedule cards) may not be sold.

3. NCAA Bylaw 12.5.2.1: An individual "shall not be eligible" to participate in intercollegiate athletics if the individual (a) accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.
- B. *O'Bannon v. National Collegiate Athletics Ass'n*, 802 F.3d 1049 (9th Cir. 2015): Current and former college football and men's basketball players brought a class action against the NCAA, Electronic Arts ("EA"), and the Collegiate Licensing Company alleging violations of the Sherman Antitrust Act and action that deprived them of their right to publicity. The lead plaintiff, Ed O'Bannon, saw his likeness from the 1995 championship UCLA team used in a video game without his permission. The game featured a UCLA player who played O'Bannon's position, and also matched his height, weight, bald head, skin tone, No. 31 jersey, and left-handed shot. CLC and EA entered a \$40 million settlement that covered as many as 100,000 current and former athletes who had "appeared" in EA video games since 2003.
1. The Ninth Circuit affirmed the lower court's finding that, absent the NCAA's rules against compensation to athletes, video game makers would negotiate with student-athletes for the right to use their names, images, and likenesses. The plaintiffs therefore identified an antitrust injury-in-fact.
 2. The court did not conclude that the policy was *per se* illegal, but analyzed it under the rule of reason. Under that framework, (1) the plaintiff bears the initial burden of showing that the restraint produces significant anti-competitive effects within a relevant market; (2) if the plaintiff meets that burden, the defendant must come forward with evidence of the restraint's precompetitive effects; and (3) the plaintiff must show that any legitimate objectives can be achieved in a substantially less restrictive manner.
 - a. The NCAA offered four procompetitive justifications for its rules: (1) promoting amateurism; (2) promoting competitive balance among NCAA schools; (3) integrating student-athletes within their schools' academic community; and (4) increasing output in the college education market. The Ninth Circuit agreed with the district court that the NCAA's rules did serve

two of the precompetitive purposes: integrating academics with athletics and "preserving the popularity of the NCAA's product by promoting its current understanding of amateurism."

- b. The district court had identified two substantially less restrictive alternatives: (1) allowing NCAA schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing schools to pay student-athletes small amounts of deferred cash compensation for use of their names, images, and likenesses. The Ninth Circuit agreed that allowing schools to award grants-in-aid up to the full cost of attendance would be a substantially less restrictive alternative than the current rules, but held that the "cash payment" alternative was not a viable alternative. "We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying [name, image, and likeness] compensation are both *equally* effective in promoting amateurism and preserving consumer demand." (Emphasis in original). "[T]he district court ignored that not paying student-athletes is *precisely what makes them amateurs*." (Emphasis in original).
- c. The Ninth Circuit's summary:

We wish to emphasize the limited scope of the decision we have reached and the remedy we have approved. Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve precompetitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of

attendance to their student athletes. It does not require more.

- d. The Supreme Court denied discretionary review.
3. After *O'Bannon*: it is clear that antitrust issues are implicated if the NCAA exploits students' names and likenesses with no "compensation" – but the scope of the NCAA's obligation to student-athletes remains unclear.
 - a. *Dawn v. National Collegiate Athletics Ass'n*, 250 F.Supp.3d 401, 407 (N.D. Cal. 2017): *O'Bannon* was cited by the court to reject an FLSA claim by student-athletes against the NCAA, relying in part on *O'Bannon's* holding that not paying student-athletes "is precisely what makes them amateurs" and "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap." (*O'Bannon*, 802 F.3d at 1078).
 - b. *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 2016 WL 4154855 (N.D. Cal. Aug. 5, 2016): Student-athletes alleged that the NCAA and its member institutions violated federal antitrust law by conspiring to impose the cap on the amount of monetary and in-kind compensation a school may provide a student-athlete. The court agreed with the defendants that *O'Bannon* foreclosed the plaintiffs' claims for "cash compensation untethered to educational expenses," but not necessarily the Plaintiffs' challenge to NCAA rules prohibiting other types of "benefits" and "in-kind" compensation.

REPRESENTING NCAA COACHES AND ATHLETIC ADMINISTRATORS IN THE NCAA INFRACTIONS PROGRAM: SUMMARY

An overview of the NCAA Infractions Program, including a discussion of practice tips and pointers for representing coaches and other athletic administrators in interviews with the NCAA enforcement staff, in hearings before the NCAA Committee on Infractions, and in appeals before the NCAA Infractions Appeals Committee.

I. THE NCAA INFRACTIONS PROGRAM: AN OVERVIEW

- A. The NCAA's Jurisdiction
- B. The Investigation
- C. The Notice of Allegations
- D. The Committee on Infractions Hearing
- E. The Infractions Appeals Committee Hearing

II. THE INVESTIGATION

- A. The Duty to Cooperate
- B. The Duty to Provide Truthful Information
- C. The Duty to Maintain Confidentiality

III. THE NOTICE OF ALLEGATIONS

- A. Notice of Allegations
- B. Opportunity to Respond
- C. Written Reply

IV. THE HEARING AND THE APPEAL

- A. The Committee on Infractions Hearing
- B. The Infractions Appeals Committee Hearing

V. PRACTICE TIPS

- A. Ethical Considerations
- B. Protecting Employment
- C. An Atmosphere of Compliance

REPRESENTING NCAA COACHES AND ATHLETIC ADMINISTRATORS IN THE NCAA INFRACTIONS PROGRAM

C. James Zeszutek

I. AN OVERVIEW

- A. The National Collegiate Athletic Association ("NCAA") Constitution and Bylaws provide that "[a] basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports." (NCAA Bylaw 1.3.1). To this end, the NCAA Constitution and Bylaws provide that "[l]egislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting," and that "[m]ember institutions shall be obligated to apply and enforce this legislation, and the infractions process of the Association shall be applied to an institution when it fails to fulfill this obligation." (NCAA Bylaw 1.3.2; see *also* NCAA Bylaw 5.01 (providing for legislation governing the "conduct of intercollegiate athletics")).
- B. The NCAA exercises its jurisdiction over the conduct of intercollegiate athletics and enforces its constitution and bylaws through the "Infractions Program." According to the NCAA, its Infractions Program is designed to "uphold integrity and fair play among the NCAA membership, and to prescribe appropriate and fair penalties if violations occur." (NCAA Bylaw 19.01.1). Indeed, the NCAA Constitution and Bylaws state that "[t]he ability to investigate allegations and penalize infractions is critical to the common interests of the Association's membership and the preservation of its enduring values." (*Id.*). Critically, the NCAA Constitution and Bylaws also provide that the Infractions Program "shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels." (NCAA Bylaw 19.01.2).
- C. The NCAA Constitution and Bylaws expressly permit individuals to be represented by personal legal counsel throughout their participation in the Infractions Program. (NCAA Bylaw 19.5.4; NCAA Bylaw 19.7.7.5; NCAA Bylaw 19.10.5(b)). Thus, these materials, in addition to providing an overview of the NCAA Infractions Program, will discuss practice tips and pointers for representing head coaches and other institutional employees through the Infractions Program, *i.e.*, in interviews conducted by the enforcement staff, in hearings before the Committee on Infractions, and in appeals before the Infractions Appeals Committee.
- D. In particular, these materials will focus on representing a head coach who is accused of violating the NCAA Head Coach Responsibility Bylaw (NCAA Bylaw 11.1.1.1) through an NCAA Investigation. The Head Coach Responsibility Bylaw provides that "[a]n institution's head coach is

presumed to be responsible for the actions of all institutional staff members who report, directly or indirectly, to the head coach. An institution's head coach shall promote an atmosphere of compliance within his or her program and shall monitor the activities of all institutional staff members involved with the program who report, directly or indirectly, to the coach." (NCAA Bylaw 11.1.1.1).

1. A head coach violates the Head Coach Responsibility Bylaw if a violation occurs within his/her program, unless he/she can "clearly demonstrate he or she promoted an atmosphere of compliance and monitored his program."
2. A head coach has a "special obligation" to "establish a spirit of compliance among the entire team, including assistant coaches, other staff, and student-athletes." This means that a head coach must "generally observe" the activities of assistant coaches, staff, and student-athletes to ensure compliance with NCAA Bylaws and must set a proper tone of compliance and monitor the activities of assistant coaches, staff, and student-athletes.
3. *Syracuse University*
 - a. Public Infractions Decision, March 6, 2015.
 - b. Infractions Appeals Committee Report, December 3, 2015.

II. THE INVESTIGATION

- A. The NCAA Constitution and Bylaws require information regarding alleged rules violations to be reported to the enforcement staff. The enforcement staff typically will review information provided to it and attempt to assess the credibility of that information before proceeding with an investigation. Should the enforcement staff determine that an investigation is warranted, the enforcement staff will notify the member institution's president or chancellor. The enforcement staff, typically with the assistance of the institution's athletic department, office of general counsel, and retained outside counsel, will conduct its investigation by interviewing involved individuals and demanding information and documents from the institution and involved individuals.
- B. Even if a head coach is not an "Involved Individual" as defined by NCAA Bylaw 19.02.1, *i.e.*, a current or former institutional staff member who has received notice of involvement in alleged violations, it is possible and perhaps even likely that a head coach will be interviewed by the enforcement staff if violations are alleged to have occurred within that head coach's athletic program. It is crucial for head coaches to treat any enforcement staff interview as though he/she is an Involved Individual being interviewed regarding his/her alleged involvement in alleged violations. This includes exercising the right to have personal legal counsel present for the interview. (See NCAA Bylaw 19.5.4).

- C. The NCAA describes individuals employed by or associated with member institutions for the administration, the conduct, or the coaching of intercollegiate athletics as "teachers of young people." (NCAA Bylaw 19.01.5). Thus, institutional employees, including head coaches, at NCAA member institutions have an affirmative responsibility to do "more than avoid improper conduct or questionable actions." Rather, the NCAA Constitution and Bylaws state that "[t]heir own moral values must be so certain and positive that those younger and more pliable will be influenced by a fine example." Indeed, the NCAA Constitution and Bylaws state that "[m]uch more is expected of them than of the less critically placed person." In an NCAA investigation, this includes the (1) duty to cooperate; (2) the duty to provide truthful information; and (3) the duty to maintain confidentiality.
- D. The NCAA Constitution and Bylaws require current and former institutional staff members to "protect the integrity of investigations" and "to make a full and complete disclosure of any relevant information," including any information requested by the Enforcement Staff, the Committee on Infractions, or the Infractions Appeals Committee. (NCAA Bylaw 19.2.3). This may require a head coach to appear for multiple interviews with the Enforcement Staff. This may also require a head coach to provide the Enforcement Staff with access to his/her email and phone records (both institutional and personal accounts), bank records, and personal notes/journals/diaries. It is important to note that "exemplary cooperation" may constitute a "mitigating factor" for purposes of determining a penalty for a violation of NCAA Legislation. (NCAA Bylaw 19.2.3.1).
- E. The NCAA Constitution and Bylaws also require individuals to provide "truthful information" during interviews. Specifically, NCAA Bylaw 19.5.5.2 provides that "[a]t the beginning of an interview involving the enforcement staff, . . . a current or former institutional employee shall be advised that refusing to furnish information or providing false or misleading information to the NCAA, conference, or institution may result in an allegation that the individual has violated NCAA ethical-conduct bylaws." Indeed, NCAA Bylaw 10.1(a) provides that "[r]efusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution" shall constitute "unethical conduct." Finally, it is important to note that enforcement staff investigations are "confidential." (See NCAA Bylaw 19.5.3). In fact, prior to any interview, the individual being interviewed is required to sign a statement of confidentiality which forbids the individual from discussing the substance of the interview with anyone other than his/her personal legal counsel and the enforcement staff.
- F. In *Syracuse University*, the investigation lasted for more than seven (7) years before the enforcement staff's final Notice of Allegations was issued. During these seven (7) plus years, the head men's basketball coach was interviewed on five (5) separate occasions by the institution and the enforcement staff.

III. THE NOTICE OF ALLEGATIONS

If the enforcement staff, the institution, and the involved individuals are unable to reach agreement on proposed findings of fact and violations of NCAA legislation, the investigation will be submitted to the Committee on Infractions through the Notice of Allegations and Opportunity to Respond Bylaw. (NCAA Bylaw 19.7). The enforcement staff will issue a Notice of Allegations to the institution and involved individuals, which Notice of Allegations will generally set forth alleged violations of NCAA legislation, the factual details underlying those alleged violations, and the "Factual Information," *i.e.*, interviews, documents, etc., upon which the enforcement staff may rely in presenting the alleged violations to the Committee on Infractions. The institution and involved individuals will then have an "Opportunity to Respond" to the Notice of Allegations within 90 days of the issuance of the Notice of Allegations. Typically, this requires the institution and involved individuals to review the interviews and other information and documents collected by the enforcement staff during its investigation, conduct their own interviews and collect their own information and documents, and then respond to the Notice of Allegations. The enforcement staff then has 60 days to prepare its own "Written Reply" to any response submitted by the institution and/or involved Individuals.

- Division I Committee on Infractions: Internal Operating Procedures, Internal Operating Procedure 4-12-1, Interviews Conducted After Notice of Allegations. "Following the issuance of the notice of allegations, any party that desires to conduct interviews of potential witnesses in the case, or interviews regarding information potentially germane to the case shall notify the chair, or the chief hearing officer if assigned, in writing of the need to conduct and record an interview. Unless the party can demonstrate good cause in the notification for precluding other parties from the interview, the party shall afford all other parties notice and a reasonable opportunity to be present at the interview. The committee may reject any information adduced from the interview if the interviewing party fails to comply with this procedure. Upon completion of the interview, it will be the responsibility of any party conducting additional interviews to transcribe the interviews in written format and request in writing that the chair, or the chief hearing officer, if assigned, add the interviews to the record. The chair, or chief hearing officer, if assigned, has the final authority to determine whether additional interviews will be added to the record."

IV. THE HEARING AND THE APPEAL

- A. After the Notice of Allegations, Response, and Written Reply are submitted to the Committee on Infractions, the Committee on Infractions will hold a hearing to make "factual findings" and "conclusions" regarding whether violations of NCAA legislation occurred. If the Committee on Infractions determines that violations occurred, the Committee on Infractions will then issue penalties to the institution and involved individuals.

- B. Involved individuals are required to attend hearings before the Committee on Infractions. In addition, the Committee on Infractions may compel the attendance of any individual whom the Committee on Infractions believes may have knowledge regarding alleged violations. It is also important to note that the duty to cooperate, the duty to provide truthful information, and the duty of confidentiality continue throughout the hearing. The Committee on Infractions is required to base its decision on "information presented to it that it determines to be credible, persuasive, and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." (NCAA Bylaw 19.7.8.3).
1. An involved individual is permitted to make a brief presentation, either through the involved individual or his/her personal legal counsel (and sometimes both), but is not permitted to cross-examine witnesses at a Committee on Infractions Hearing. An involved individual is, however, subject to questioning by the members of the Committee on Infractions. The involved individual's presentation, along with the involved individual's answers to the questions asked by the Committee on Infractions, is perhaps the most critical moments for an involved individual in defending himself/herself against the Notice of Allegations.
 2. In evaluating whether violations of NCAA legislation occurred, the members of the Committee on Infractions may ask questions of any individuals in attendance at the hearing, including institutional employees and members of the enforcement staff. Although it has the ability to do so, the Committee on Infractions rarely requires enrolled student-athletes to attend hearings before the Committee on Infractions.
 3. In *Syracuse University*, the Committee on Infractions concluded that "[t]he head basketball coach failed to promote an atmosphere of compliance and monitor the activities of his staff when his director of operations freely committed academic fraud and was involved in student-athletes receiving academic extra benefits and violations," and suspended the head men's basketball coach for the first nine conference games for the 2015-2016 season.
- C. Once the Committee on Infractions issues its decision, *i.e.*, its factual findings and conclusions, the institution and the involved individuals then have an opportunity to submit an appeal to the Infractions Appeals Committee. The appeal must be submitted within 30 days of the Committee on Infractions' decision, and is limited to a challenge to (1) a factual finding made by the Committee on Infractions being clearly contrary to the information presented to the Committee on Infractions; (2) whether the facts found by the Committee on Infractions constitute a violation of the NCAA Constitution and Bylaws; and/or (3) whether there was a "procedural error" which resulted in an improper factual finding or conclusion. Alternatively, an institution or involved individual can challenge a penalty prescribed by the Committee on Infractions as constituting an "abuse of discretion." The institution or involved individual

will then submit an "Initial Statement in Support of Appeal," to which a "Committee Appeals Advocate" will then submit a response on behalf of the Committee on Infractions. A separate hearing will then be held before the Infractions Appeals Committee, after which it will publish its own decision, *i.e.*, its own factual findings and conclusions.

- In *Syracuse University*, the Infractions Appeals Committee affirmed the Committee on Infractions' finding that the head men's basketball coach violated the Head Coach Responsibility Bylaw, but modified the penalty imposed by the Committee on Infractions to only apply to the next available nine (9) games of the 2015-2016 season.
- D. The Committee on Infractions and the Infractions Appeals Committee generally have broad discretion to impose penalties on the institution and involved individuals, including so-called "competition" penalties and "financial" penalties, scholarship reductions, "head coach restriction" penalties, and recruiting restrictions. (NCAA Bylaw 19.9.5).
- E. For a head coach, the most significant penalty that can be imposed is the penalty imposed in the *Syracuse University* case, *i.e.*, a "Head Coach Restriction" penalty. (NCAA Bylaw 19.9.9.5). NCAA Bylaw 19.9.9.5 provides that:

If a determination is made by the hearing panel that an employing institution has not taken appropriate disciplinary or corrective action regarding a head coach found in violation of Bylaw 11.1.1.1, the panel may issue an order that the institution suspend the coach for a number of contests from the range set forth in Figure 19-1 that would apply to the underlying violation(s) unless the institution appears before the panel to show cause why the suspension should not be applied. Decisions regarding disciplinary or corrective actions involving personnel shall be made by the institution, but the determination of whether the action satisfies the institution's obligation of NCAA membership shall rest solely with the Committee on Infractions.

In other words, the Committee on Infractions has the authority to, in effect, require a college or university to terminate a head coach (or, at a minimum, restrict that head coach's athletically related duties) based upon violations of the NCAA Constitution and Bylaws. This is an extremely harsh penalty, and can effectively forever end a head coach's ability to work for an NCAA member institution.

V. PRACTICE TIPS

- A. Although the NCAA Committee on Infractions and NCAA Infractions Appeals Committee are not traditional legal forums, there are a number of ethical obligations of which lawyers should be aware when representing

clients in NCAA Infractions matters. Indeed, the Rules of the Supreme Court of Kentucky define the "Practice of Law" to include "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services." (SCR 3.020). To this end, certain of the Rules of Professional Conduct should be considered when a lawyer is representing an individual through the NCAA Infractions Program.

1. Kentucky Rule of Professional Conduct 1.1. Competence. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (SCR 3.130(1.1)).
2. Kentucky Rule of Professional Conduct 1.7. Conflict of Interest: Current Clients. "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." (SCR 3.130(1.7(a))). However, "a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved." (SCR 3.130(1.7(b))).
3. Kentucky Rule of Professional Conduct 1.8. Conflict of Interest: Current Clients; Specific Rules. Subsection (f). "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6." (SCR 3.130(1.8(f))).
4. Kentucky Rule of Professional Conduct 3.3. Candor toward the Tribunal. Subsection (a). "A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal published legal authority in the controlling jurisdiction known to the lawyer to

be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence" (SCR 3.130(3.3(a))).

5. Kentucky Rule of Professional Conduct 3.6. Trial Publicity. "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." (SCR 3.130(3.6(a))); *see also*, NCAA Bylaw 19.01.3 ("Except as provided in this article, the Committee on Infractions, the Infractions Appeals Committee and the enforcement staff shall not make public disclosures about a pending case until the case has been announced in accordance with prescribed procedures. An institution and any individual subject to the NCAA constitution and bylaws involved in a case, including any representative or counsel, shall not make public disclosures about the case until a final decision has been announced in accordance with prescribed procedures.")

B. There are immense pressures associated with involvement in an athletics program at an NCAA member institution, not the least of which is a head coach's obligations under the NCAA Constitution and Bylaws, and in particular, the Head Coach Responsibility Bylaw. There are steps that a head coach can take in order to protect himself/herself in the event of an NCAA investigation.

1. Promote an atmosphere of compliance within his/her program (assistant coaches, staff, student-athletes, boosters);
2. Monitor the activities regarding compliance of staff members involved with the program who report, directly or indirectly, to the head coach;
3. Meet with the chancellor or president to discuss his/her expectations for compliance;
4. Meet with the athletic director to discuss his/her expectations for compliance;
5. Meet with the director of compliance to discuss his/her expectations for compliance;
6. Meet with assistant coaches, staff, and student-athletes to discuss expectations for compliance;

7. Know compliance obligations (who, what, when, where, why, how) for reporting actual and potential NCAA rules violations;
8. Maintain contemporaneous documentation of all meetings with the president/chancellor, athletic director, director of compliance, assistant coaches, staff, and student-athletes regarding expectations for compliance;
9. Maintain contemporaneous documentation of any compliance education seminars, meetings, etc.;
10. Maintain contemporaneous documentation of any reports, inquiries, discussions, etc. regarding compliance issues; and
11. Exercise the right to be represented by personal counsel familiar with NCAA Infractions matters.

