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May 2008 Volume 9, Issue 7

Legal Issues in COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

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Legal Issues in COLLEGIATE ATHLETICS

University of Kansas Secures Victory in Trademark Infraction Case

A federal judge has granted, in part, a summary judgment motion brought by the University of Kansas in a trademark infraction case, finding some clothing merchandise being sold by a retailer is so similar to KU's licensed merchandise that there would be confusion.

The court also rendered numerous evidentiary rulings in the lengthy opinion, which are not addressed in this summary.

As background for its summary judgment rulings, the court noted that "KU does not manufacture apparel, but … licenses its trademarks to hundreds of different persons or entities and its marks appear on a wide variety of competing products with varying levels of quality. KU licenses its marks to businesses in Lawrence as well as nationally. The licensing of KU's trademarks is managed by cross-claim defendant Collegiate Licensing Company of Atlanta, Georgia. KU's licensees are provided with art slicks that are incorporated into all license agreements. The art slicks detail KU indicia, including trademarks, service marks, trade names, designs, logos, seals, and symbols. The license agreements make clear that KU owns and licenses additional trademarks that may not appear on the art slicks. An account representative for CLC routinely reviews KU licensees' products in the retail marketplace to make sure that they comply with product and licensing standards. KU does not permit the use of offensive language or references to sex or alcohol on officially licensed products. KU monitors authorized uses of its color scheme and has set standards to instruct KU representatives and licensees as to how the crimson and blue color scheme is to be presented." It went on to note that KU's licensed products produce millions in sales each year.

The court then described how one of the defendants in the case, Victory Sportswear, pushed the envelope with its Joe-College.com subsidiary, selling KU-related merchandise, which was not licensed by the university. In fact, some of the merchandise included suggestive language, which could be deemed by some to be in bad taste.

In a letter dated May 30, 2006, KU Athletic Director Lew Perkins requested that the defendant discontinue selling certain T-shirt designs sold by his company, and that it "cease production and sale of any other items that infringe on the University's trademarks, including the term Kansas, and cease the use of designs that are closely identified with the University."

Perkins went on to state that many of the designs sold and produced through the Joe-College.com business were offensive to the University, or disparaged the athletic programs or coaches. KU ultimately sued, asserting the following claims: (1) Federal trademark infringement under 15 U.S.C. § 1114, (2) federal unfair competition under 15 U.S.C. § 1125(a), (3) federal trademark dilution, (4) trademark infringement under K.S.A. § 81-213, (5) trademark dilution under K.S.A. § 81-214, and (6) common law trademark infringement and unfair competition.

After reviewing an extensive series of factors, the court found that summary judgment "is only appropriate as to the few T-shirts that the Court has singled out as displaying marks that are overwhelmingly similar to KU's marks. These striking similarities trigger a presumption that defendants intended to infringe. These two factors weigh so heavily in favor of a likelihood of confusion that no reasonable jury could find otherwise.

"Additionally, it is uncontroverted that no disclaimers were present at the Joe-College.com store or website during the time these T-shirt designs were offered for sale. Accordingly, summary judgment on the trademark infringement claims is granted in favor of plaintiffs with regard to these specific T-shirt designs."

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Evidence Exists to Deem the NCAA a State Actor

By Kadie Otto, Ph. D., Assistant Professor of Sport Management, Western Carolina University

Most recently, my colleague[1] and I presented a paper at the inaugural College Sport Research Institute (CSRI) conference held at The University of Memphis[2]. In this paper, entitled "The NCAA: A case for state action," we presented the factual evidence and the legal underpinnings which could lead a future court to hold the NCAA to be a state actor.

First, we gave an overview of the Supreme Court's "entwinement" analyses as applied in the cases of *Burton v. Wilmington Parking Authority*(1961) and *Evans v. Newton*(1966), and described how the lower courts found private athletic associations to be state actors in the high school setting and the NCAA to be a state actor pre-*Tarkanian*(1988). Then, we highlighted the *Blum*-trilogy (*Blum v. Yaretsky*, 1982; *Rendall-Baker v. Kohn*(1982); and, *Lugar v. Edmondson Oil Co.* (1982) which restricted the state action doctrine and described how courts subsequent to the *Blum*-trilogy concluded the NCAA was not a state actor.

In the Supreme Court's *Tarkanian* analysis, in which it concluded that the NCAA was not a state actor, it relied in large part on the rationale that a member school has a voluntary choice to withdraw from the NCAA should it disagree with a NCAA sanction. The reality of big-time college athletics, however, is that a NCAA member school's voluntary withdrawal is not *actually* voluntary but rather a case of "economic duress"[3].

Additionally, *Brentwood*(2001) and *Burton*(1961) recognized that the ability to voluntarily withdraw from unconstitutional behavior is not determinative of whether state action exists where the relationship is otherwise so interdependent as to make that "choice" a nullity. *Brentwood* is also important in that it acknowledges the modern-day practical reality that public schools must depend upon private athletic associations to carry out an integral part of their educational mission and that their joint participation in that endeavor is a factor in finding state action.

Finally, we analyzed the relationship between the public school members and the NCAA and applied *Brentwood* and *Burton* to conclude the NCAA, like the high school athletic associations, should be deemed a state actor:

1) public membership—while the NCAA's total membership is 44% public, Division I (which brings in over 98% of the NCAA's total revenue) consists of 66% public schools. Further, the NCAA allocated $420 million to Division I and just $27million to Division II and $19.5 million to Division III;
2) voting members who adopt rules/regulations are public—The four most powerful committees in the NCAA are the Executive Committee (71% public), the Board of Directors (78% public), the Management Council (80% public), and the Committee on Infractions (80% public);
3) enforcement—Since the inception of the NCAA's enforcement arm in 1953, 67% of all members charged with a major violation have been public schools. Furthermore, of those members who have committed three or more major violations (up to eight), 86% are public.;
4) public schools' educational obligation: (a) athletics integral—Public schools meet a portion of their educational objectives, in part, through athletics—which they have delegated control of to the NCAA, (b) schools have a financial stake in the system. Consider the following annual university athletic department budgets: Oregon $50 million, Alabama $82 million, Michigan $89 million, Tennessee $95 million, Texas $105 million, and Ohio State and Florida, each, at $109 million. What's more, tax payer dollars contribute to funding coaches "educational" salaries (over 100 college coaches make $1 million/annually or more and over a dozen coaches make $2 million) (c) there is a need for a mechanism to regulate competition;
5) associations' money making capacity is derived from public schools; and,
6) existence of association depends on public school member—An examination of championship revenue revealed that 98% of the NCAA's total revenue is generated by the Division I men's basketball tournament ($6 billion/11-year television contract with CBS). Of the teams who have made the NCAA tournament from 1939-2006, 63% are public. Therefore, 98% of the NCAA's annual revenue is being generated by just 6% of its total membership, of which 63% are public.

Based on existing case law, the factual evidence exists for a court to deem the NCAA a state actor. For a court to hold otherwise ignores the dilemma public schools face when they are subject to constitutional standards but are not in a position to withdraw from the NCAA when those standards conflict with the NCAA rules. Further, it overlooks the incentives (or disincentives) of the business of intercollegiate athletic competition. While it is certain that the NCAA does need the ability to enforce its rules uniformly, it should not be granted the ability to do so *at the expense* of constitutional rights. ■

1 Kristal Stippich, J.D., Gass Weber and Mullins, LLC

2 April 17-20th, 2008

3 Economic duress is "an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will" (Black's Law Dictionary, 7th ed., p. 521).

University Of Colorado Appoints Gender Equity Expert Nancy Hogshead-Makar as Title IX Consultant

The University of Colorado at Boulder and the law firm of Hutchinson, Black & Cook, counsel for Lisa Simpson jointly announced last month the appointment of prominent attorney, professor and national Title IX legal expert Nancy Hogshead-Makar as the school's Title IX adviser.

CU-Boulder agreed to create the adviser's position as part of the settlement of Ms. Simpson's Title IX lawsuit.

Hogshead-Makar will work with CU officials in athletics, the office of university counsel and the office of CU-Boulder Chancellor G.P. "Bud" Peterson to review the university's policies and practices regarding sexual violence and harassment for CU students. She will make recommendations on creating enhancements and programmatic improvements in these areas, as well as acting as a resource for students who have experienced sexual harassment on campus.

"I am eager to begin my visits to Boulder and to begin working with a group of committed educators, administrators, student-athletes and community members for the betterment of the university community, and especially for the women of the CU-Boulder campus," said Hogshead-Makar.

Hogshead-Makar is a tenured professor at Florida Coastal School of Law in Jacksonville, Fla. She is one of the country's foremost experts in Title IX and has been a dedicated advocate for the advancement of women's issues, particularly in athletics. She is a past president of the Women's Sports Foundation and currently serves as its legal adviser. Her book, "Equal Play: Title IX and Social Change," co-authored with sports economist Andrew Zimbalist, was recently released.

Professor Hogshead-Makar is a graduate cum laude of Duke University in political science and women's studies (1986) and holds a Juris Doctor degree from the Georgetown University Law Center (1997). While at Duke, she set school swimming records in eight different events. She qualified for the 1980 Moscow Olympics (which the United States boycotted) and swam in the 1984 Los Angeles Olympics, where she won three gold medals and a silver medal. She has been inducted into 11 halls of fame for her athletic accomplishments and contributions to sports.

"In our view, there is no one in the country better qualified to take on the role of Title IX adviser envisioned in the settlement," said Baine Kerr, legal counsel for Lisa Simpson. "Her appointment is an important step in the university's commitment to address the problems that gave rise to Ms. Simpson's lawsuit, and we believe it is a measure that will become a model for universities across the country."

In the settlement of the Title IX litigation, the university agreed to appoint an independent Title IX adviser to assist it in identifying any further reforms that will prevent sexual harassment and misconduct. The university has also committed to add a violence prevention coordinator on the Boulder campus. That position has been posted and the campus is accepting applications.

"I'm excited the university is appointing someone of Professor Hogshead-Makar's stature," said Simpson. "I'm hopeful this will lead to continuing changes that will prevent what I went through from happening to other women at this and other universities." ■

Vaccaro, Others Discuss NCAA and Amateurism at Symposium

Sonny Vaccaro spun around, almost tripping on the wire attached to his microphone. The controversial 68-year-old sports marketing genius was yelling now, ranting against the NCAA. "Student. Athlete. Non-profit. Don't you see? It's a trick," said Vaccaro, surveying a room of about 50 sports law practitioners.

Vaccaro was a controversial selection as keynote speaker for the Columbia University Sports Ethics Symposium, which was held April 24 at NFL Headquarters in New York City. He showed why in a 30-minute warmup speech, before settling back into a panel discussion with Chris Bevilacqua, Co-Founder of CSTV Networks; Adolpho Birch, General Counsel of the National Football League; Gary Charles, a power broker with regard to youth basketball select teams in the New York area; Robert Lipsyte, an Award-winning sports journalist; and Chris Monasch, the AD at St. Johns University. Gus Johnson, a Play-by-Play Announcer for CBS Sports, moderated the symposium.

Vaccaro is widely credited with introducing the concept of show contracts for contracts, summer camps for high school basketball stars and identifying other revenue-producing niches in the sports marketing world.

So it would surprise no one that Vaccaro painted the NCAA as a self-serving and domineering when it comes to taking advantage of underprivileged student athletes. "One percent of the athletes pay for 90 percent of the budget of the typical athletic department," he said.

Pity poor Monasch, who had the primary responsibility of defending the NCAA in an anti-NCAA environment. More than once, he pointed out that if the NCAA is indeed self-serving, what does that make Vaccaro. To his credit, Vaccaro didn't disagree, but rested on the position that the NCAA portrays itself as a "non-profit."

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Court Sides with NCAA on Discovery Motion in Long-Running Eligibility Suit

A district judge has denied a plaintiff's motion to compel in a case involving a parent's attempt to force the NCAA to continue to broaden its acceptance of learning-disabled student athletes.

A decade ago, Kathleen Bowers sued the NCAA and two of its member schools, Temple University and the University of Iowa, for discrimination after her son, Michael, was allegedly denied an opportunity to compete in college athletics because of a learning disability. Specifically, she alleged that the defendants had violated Titles II and III of the Americans with Disabilities Act of 1990.

Bowers initially lost at the district court level when a trial judge granted the defendants' motion for summary judgment, which relied in large part on a finding of discovery violations. Specifically, the court determined that the plaintiff's failure to disclose the information about her son's drug abuse problem and depression in a timely fashion was a willful one, in bad faith and that it irreparably prejudiced Temple's ability to prepare a defense to his mother's claims.

The 3rd U.S. Circuit Court of Appeals breathed new life into the case last year when it overturned the trail court's decision.

On remand, the plaintiff moved to compel the deposition testimony of a Rule 30(b)(6) witness from the National Collegiate Athletic Association and the production of related discovery materials. Specifically, the plaintiff wanted the NCAA to produce a witness to testify about the changes in the organization's initial eligibility bylaws and policies relating to high school students with learning disabilities that have occurred since the 1995-1996 academic year.

The plaintiff also sought four categories of documents at least fourteen days prior to the requested deposition: 1. All documents concerning the changes in the NCAA's bylaws, policies, rules and practices in place to determine the initial eligibility of student-athletes with learning disabilities who seek qualifier status to the NCAA's Division I and Division II member institutions, 1995-96 to the present.

2. All documents concerning the research, data, analysis, reports, and other information concerning the reasons for the changes in the NCAA's bylaws, policies, rules, and practices concerning initial eligibility for students with learning disabilities and the impact on their academic success and graduation rates, from 1995-96 up to and including the present, including all communications with DOJ concerning initial eligibility for students with learning disabilities.

3. All documents concerning the research, data, analysis and other information concerning the effects of the changes in the NCAA's bylaws, policies, rules, and practices concerning initial eligibility for students with learning disabilities, from 1995-96 up to and including the present, including the effect of these changes on academic success and graduation rates, and including all communications with DOJ concerning initial eligibility for students with learning disabilities.

4. Data, analysis, reports and other information from the NCAA's Clearinghouse and its Academics/Eligibility/ Compliance Cabinet on the rules, policies and practices concerning the initial eligibility for students with learning disabilities from 1995-96 up to and including the present, including the certification of special education courses as core courses, the acceptance of untimed SAT and ACT scores and the waiver process for students with disabilities.

In support of her motion, the plaintiff argued that the requested discovery is relevant to the defendants' potential defense at trial that the initial eligibility requirements were necessary in 1995-1996 in order for the NCAA to achieve its goal of ensuring that student athletes succeeded academically in college. The NCAA countered that the Court should deny the plaintiff's motion on all of the grounds set out in Federal Rule of Procedure 26(b)(2)(C).

The court concluded that "the discovery sought by the plaintiff in the instant motion to compel is disproportionate to the needs of the case for two reasons. First, the Court agrees with the NCAA that the plaintiff has had more than 'ample opportunity' to explore the issues she seeks to probe in the proposed deposition. F. R. Civ. P. 26(b)(2)(C)(ii). The plaintiff seeks to depose an NCAA witness in order to update the evidence she has collected regarding the organization's initial eligibility requirements and the fact that those requirements have changed since the 1995-1996 academic year. When the plaintiff initially deposed Mr. Lennon, Mr. Dempsey, and Mr. Petr in 1999, however, she had the opportunity to ask about the evolution of the eligibility requirements over the course of three years, and, in fact, took advantage of this opportunity. Indeed, the NCAA policy of 1995-96 at issue here had been superseded by the new policy reflected in the 1998 Consent Order. The plaintiff could and did inquire into all the reasons why the 1995-96 policy was implemented, how it affected the plaintiff's son, and how the new improved mechanism worked for applicants from a special education background. In the plaintiff's deposition of Mr. Lennon in 1999, for example, Mr. Lennon was asked '[a]nd today, the process that the NCAA uses to make a determination about the eligibility for students with learning disabilities, how does it differ from the process that was in place in 1996?' (Def.'s Opp'n Br. Ex. 3.) By the time Mr. Lennon was deposed, the 1998 Consent Decree that Plaintiff points to as evidence of the NCAA's changing eligibility policies had been in place for nearly a year. Plaintiff's observation that the terms of the Consent Decree expired in 2003 and that she does not know the current

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state of the NCAA's eligibility policies does not diminish the opportunities she had to depose witnesses about the changes in such policies that occurred in the years following her son's alleged injury. The plaintiff has no standing to challenge the current policies, nor is the NCAA obliged in this case to explain or defend those policies, whatever they may be.

"Moreover, the plaintiff's prior opportunities to discover the changes that have taken place in the NCAA's policies regarding initial eligibility determinations were not limited to these depositions. As the NCAA explained at the February 25, 2008 hearing, over the course of two full discovery periods it has produced approximately 18,000 documents pertaining to the adoption of its eligibility bylaws, its policies concerning core course requirements and eligibility waivers, and the 1998 Consent Decree. At the same hearing, the plaintiff acknowledged having received documents pertaining to the changes in the NCAA's eligibility policies through July 2001, five years after the alleged act of discrimination underlying this case took place.

"In short, these discovery periods, depositions, and document production have afforded Plaintiff an 'ample opportunity' to discover information pertaining to the NCAA's eligibility policies in 1995-1996 and the changes in those policies that occurred over the following years. F. R. Civ. P. 26(b)(2)(C)(ii).

"The second reason for the Court's determination that the proposed discovery is disproportionate to the legitimate needs of this case is the fact that evidence pertaining to the evolution of the NCAA's eligibility policies beyond that which the plaintiff has already discovered is at best only 'marginally relevant' to the plaintiff's stated need for the evidence."

The court continued, noting that the action "is not a situation where Michael Bowers was denied admission to college, as he indeed matriculated at Temple University. This is not a class action, nor is injunctive relief available to Plaintiff. If Plaintiff succeeds in proving actionable discrimination, monetary relief is sought. The costs of litigating this case over these ten years, in this Court and the Court of Appeals, has surely dwarfed the financial stakes that remain at issue. It is for just such circumstances that the rule of proportionality was adopted."

"Furthermore, it is not insignificant that the NCAA concedes that its policies changed between 1996 and 1999 and have continued to change in succeeding years. See Boody v. Township of Cherry Hill, 997 F. Supp. 562, 574 (D.N.J. 1997).

"The plaintiff has had ten years to gather support for the claims filed in 1997. In short, the Court finds that Plaintiff has had more than an 'ample opportunity' to discover information bearing on the issues in this case, and that the burden of embarking on yet another round of discovery at this point in the case considerably outweighs any marginal benefit that such efforts might yield.

Kathleen Bowers v. NCAA et al.; D.N.J.; Civil Action No. 97-2600 (JBS), 2008 U.S. Dist. LEXIS 14944; 2/27/08 Attorneys of Record: (for plaintiff) A. Richard Feldman (Argued), Richard L. Bazelon, Noah H. Charlson, Bazelon, Less & Feldman, Philadelphia, PA; Barbara E. Ransom, Public Interest Law Center of Philadelphia, Philadelphia, PA. (for Temple) John B. Langel (Argued), Shannon D. Farmer, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, PA. (for NCAA) J. Freedley Hunsicker, Jr. (Argued), Drinker, Biddle & Reath, Philadelphia, PA. (University of Iowa) Jack J. Wind, Margulies, Wind & Herrington, Jersey City, NJ; Gordon E. Allen, Mark Hunacek (Argued), Office of Attorney General of Iowa, Des Moines, IA. ■

Calendar

MAY

May 18-23, 2008
NCAA Regional Rules Seminar
Boston, Massachusetts
For more info, visit: www.ncaa.org

JUNE

June 1-6, 2008
NCAA Regional Rules Seminar
San Antonio, Texas
For more info, visit: www.ncaa.org

June 9-12, 2008
National Association of Collegiate Athletic Directors
Dallas, Texas
For more info, visit: nacda.cstv.com

JANUARY

January 14-17, 2009
NCAA Annual Convention
Washington, D.C. (Gaylord National)
For info, visit: www.ncaa.org

KU Secures Victory

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University Of Kansas et al. v. Larry Sinks et al.; D. Kan.; Case No. 06-2341-JAR, 2008 U.S. Dist. LEXIS 23765; 3/19/08

Attorneys of record: (for plaintiffs) Alicia Grahn Jones, Jerre B. Swann, R. Charles Henn, Jr., William H. Brewster, LEAD ATTORNEYS, PRO HAC VICE, Kilpatrick Stockton LLP - Atlanta, Atlanta, GA; Douglas M. Greenwald, LEAD ATTORNEY, McAnany, Van Cleave & Phillips, P.A. -- KCK, Kansas City, KS. (for defendants) Mark T. Emert, William J. Skepnek, LEAD ATTORNEYS, Skepnek Fagan Meyer & Davis PA, Lawrence, KS., Charles T. Schimmel, LEAD ATTORNEY, Hill, Beam-Ward, Kruse, Wilson & Wright, LLC, Overland Park, KS; Mark T. Emert, William J. Skepnek, LEAD ATTORNEYS, Skepnek Fagan Meyer & Davis PA, Lawrence, KS. ■

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College Coaches-in-Waiting: Good Idea, or Unnecessary?

By Daniel A. Etna, Esq.

The University of Kentucky recently designated offensive coordinator Joker Phillips as its next head football coach, effective when Rich Brooks retires. At Texas Tech, when Bob Knight decided mid-season that enough was enough, the handoff to his son Pat was relatively seamless because the school had publicly pronounced that the younger Knight was the eventual successor. In Happy Valley, however, the octogenarian Joe Paterno is working with neither a contract nor an heir apparent.

Why do some colleges and professional franchises designate head-coaches-in-waiting, and others do not? What are the upsides and downsides of both methods?

There are strong parallels between corporate America and collegiate and professional sports teams when it comes to succession planning. My law practice spans both worlds; I am primarily a corporate attorney, advising companies on all matters of business, including succession planning, but I also have a sub-specialty in advising professional sports franchises on their business matters. In these roles, I see the similarities and differences – and the commonalities are far greater – between succession planning in athletics and in commerce.

Most entry-level employees – graduate assistant coaches and mailroom workers alike – dream of someday sitting in the corner office. The head coach is analogous to the chief executive officer, and the assistant coaches are positioned similarly to corporate executives, most of whom covet the top job. There is no objective right or wrong way to plan for the replacement of the person at the top. The issues are too fact-sensitive to generalize and conclude that it's better to announce a successor ahead of time or wait until the moment arrives.

Factors that argue in favor of anointing eventual head coaches and CEOs before the office-holder resigns or retires include:

- Retention of current talent and recruiting of future talent. The athletics-business analogy holds here, and it centers on continuity. College teams want their key players to know who the next head coach will be if the current head coach plans to leave – or is at an age where he might depart suddenly – before that actually happens. Recruits want to know whom they will play for, and uncertainty about the near future might cause them to look elsewhere. Professional athletes have the same options, to declare free agency or re-sign with their teams. And in the business world, retaining and attracting key employees at all levels is equally important. In both cases, the styles of the CEOs or head coaches is important to the talent. Quarterbacks with million-dollar arms generally prefer to play for coaches who like to throw, and running backs with million-dollar legs prefer those who lean toward a ground game.
- Among the most crucial retentions is that of the assistant coach – or executive vice president or chief operating officer – whom the team or company has identified as the best choice to lead in the future. Publicly designating the successor gives that person ample reason to stay and no reason to leave. It gives both the house and the talent comfort and the ability to plan their futures. With every upside comes a downside, and this is no exception. The assistant coaches and high-ranking executives who are not next in line will probably start looking to leave when the announcement is made. But the fact is that most will scatter once the change is made, regardless of whether it was announced ahead of time.
- Your customers – consumers of products and services in the business world, and ticket-buying fans in the athletic world – also want to know that there is a plan and continuity.
- In the world of collegiate sports, the boosters and alumni – who tend to donate money – also tend to prefer continuity (although, truth be told, they really crave being in on the decision itself.) And the university at large, which stands to gain revenue from appearances in bowl games and on television, has a stake in knowing.

There is no one-size-fits-all approach to succession planning, however. A school, pro franchise or widget manufacturer would probably be well advised not to designate a successor – publicly, at least – when the current job-holder is fairly young. Who among the assistants would want to be the designated successor behind a 45-year-old?

The parallels between the corporate world and the world of big-time athletics are strong but not infinite. There is more interaction between a head coach and his starters, for instance, than between a CEO and mid-level executives who ultimately report to him. Also, shareholders have more of an entitlement than fans to know who will lead a company once the CEO is finished. Fans can choose to continue buying season tickets or let their subscriptions lapse, but shareholders must decide whether to hold – or sell – their stock. Finally, the high-ranking business executives who are passed over as successor to the CEO may stay with the company regardless because they have equity positions or pension entitlements.

Another consideration when deciding whether to designate is the state of the

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franchise or the company. If a company is in the middle of a reorganization or restructuring, and the CEO is not likely to stay for the long haul or through a significant corporate event, it becomes more pressing for the company to designate the person who will carry the torch through the challenging times. Leaving aside momentarily the needs of the shareholders, creditors and lenders will be eager to know who is in line to lead the company. And if the team is losing games or the company is losing money, by announcing early you send a signal to all your constituents that there is a plan to improve, and that the status quo is unacceptable and will not be tolerated. Such a signal can energize talent, recruits, shareholders and other stakeholders.

In athletics and in business, there is also a middle ground to consider: designating privately without announcing publicly. That approach, too, has its own set of upsides and downsides and risks and rewards. Assistants and vice presidents who were not chosen as next-in-line will not be alienated and will stay aboard, and the designee has the comfort of knowing he has been selected. It is often difficult to keep information like that under wraps, however, and if the news leaks, the assistants surely would be alienated and the institution would lose credibility on a variety of issues with a number of constituents. In general, the risk-reward paradigm argues against the middle ground. By announcing publicly, an institution gets to measure fairly accurately who is disgruntled and should be removed from the landscape, and who can tolerate being passed over for the head job and is glad to continue as an underling.

In athletics and in business, there is also a middle ground to consider: designating privately without announcing publicly.

As I opined earlier, there is no objective right or wrong way to plan for the replacement of your top person, or to disseminate that information. Fact patterns can drive the decisions. But all other things being equal, let's consider a hypothetical high school junior who is on the A-list of every major college football program. Penn State – with all its tradition and success over the years, but an 81-year-old head coach with no contract and no successor named? Or Kentucky, where the virtual certainty is that either Rich Brooks or Joker Phillips will be in charge?

Daniel A. Etna, Esq., is a partner in the corporate department at New York City-based law firm Herrick, Feinstein LLP. His practice focuses on general corporate representation, corporate finance and mergers and acquisitions, with a sub-specialty in sports law. His clients include professional sports teams and a wide variety of private and public companies. He played college football at the University of Colorado and the University of Pennsylvania, from which he took his undergraduate degree. ■

Thought of the Month: *Previous court and NCAA rulings have concluded that an entity does not need knowledge of an activity to be cited for condoning it. Rather, inadequate monitoring can be construed as condoning. This is especially true in the NCAA environment where the phrase "should have known" is frequently cited in findings made by the Division I Committee on Infractions.*

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Ineligible Transfers Land Long Beach State in the Hot Seat

The NCAA Committee on Infractions penalized the Long Beach State University men's basketball program for major and secondary infractions March 6, after an investigation exposed such violations as improper benefits, impermissible transportation and phone calls, and unethical conduct by the coaching staff.

The committee wrote that between August 2004 and August 2005, the basketball coaching staff recruited six junior college transfers whose academic records made them unqualified for admittance. Some students needed to complete as many as nine credit hours in a short period of time to become eligible. In their efforts to catch the students up academically, two assistant coaches violated NCAA rules by paying the athletes' class fees, providing them impermissible transportation, and even administering unproctored exams and forging signatures to cover for their behavior. Additionally, they provided false information to members of the committee during the investigation and asked student-athletes to follow suit, the committee reported.

The entire coaching staff was let go at the conclusion of last season, and the two assistant coaches were punished additionally by the committee's imposition of a four-year show cause order for one and a five-year order for the other. These orders require that, should either coach be hired by another institution, he will be required to appear before the committee to determine if his responsibilities should be limited.

The two assistants were not held solely responsible for the violations though, according to the committee. The head coach's insufficient monitoring of the program and failure to involve the compliance department in the process of bringing the transfers in led to his reprimand. In addition, the entire athletic department was castigated by the committee for failing to sufficiently regulate the arrival of transfer student-athletes on campus—a responsibility that the committee says universities should place high on their priority lists.

"There were multiple deficiencies in the academic records of all six prospects at the time they were trying to transfer to Long Beach State," said Josephine Potuto, chair of the NCAA committee on infractions, in a conference call with the media. "A lot of the prospects needed to complete junior college course work and there was a lot of pressure on the coaches to see that it happened."

A list of penalties, some of which were self-imposed, was created by the committee as consequences for the blatant violations and insufficient monitoring by both the coaches and the athletic department. According to the committee's report, they are as follows:

- Public reprimand and censure.
- Three years of probation (March 6, 2008, to March 5, 2011).
- A prohibition from recruiting two-year college transfers or permitting such transfers to participate in men's basketball for those student-athletes entering the university for the 2008-09 academic year. (Self-imposed by institution).
- Reduction of scholarships in men's basketball from 13 to 12 in each of the 2007-08 and 2008-09 academic years. (Self-imposed by institution).
- Reduction in the number of official visits to nine (from the maximum of 12) for each of the 2007-08 and 2008-09 recruiting years. (Self-imposed by institution).
- Reduction from three to two in the number of coaches who can recruit off campus during the summer recruiting period of 2007. (Self-imposed by institution).
- A five-year show-cause order for one former assistant coach effective from March 6, 2008, through March 5, 2013.
- The second former assistant coach's current employing institution self-imposed a number of penalties, which are detailed in the public report. In addition to these penalties, the committee imposed a penalty prohibiting him from recruiting and/or signing any two-year college transfer student-athletes for the 2008-09 academic year.
- A four-year show-cause order for the second former assistant coach effective from March 6, 2008, through March 5, 2012.
- A vacation of all wins, including any recorded in conference tournaments or the NCAA Division I Men's Basketball Tournament, in which the six two-year transfer student-athletes competed while ineligible. The individual records of the six young men shall also be vacated. Further, the university's records regarding men's basketball as well as the record of the former head coach will be reconfigured to reflect the vacated records and so recorded in all publications in which the men's basketball records are reported, including, but not limited to, media guides, recruiting materials and institutional and NCAA archives. Finally, any public reference to tournament appearances and performances during this time shall be removed, including, but not limited to, athletics department stationary and banners displayed in public areas such as the arena in which the men's basketball team participates.

The team's new head coach, Dan Monson, was hired knowing that the investigation was ongoing and would likely lead to such punishments. "We knew some of this was coming," he said in a statement, "but that doesn't make it any easier."

Athletic Director Vic Cegles said that, fortunately, vacating wins involving ineligible players should not mean that the 49ers would have to give up the Big West Conference title they won last season. ■

News in Brief

Basketball Coach Sues School, AD and Attorney

The former men's basketball coach for the University of San Francisco men's basketball team has sued the school and several officials for defamation. Jessie Evans alleged that USF, its athletic director and an attorney defamed him when stipulated that the firing was for "just cause." Evans' attorney, Dan Siegel, claimed in the media that AD Debra Gore-Mann and USF attorney Michael Vartain used that tag so they would have "to pay him anything. … They made statements telling the world he's not employable."

Phil Knight's Construction Company To Build Athletic Building

More renowned for being a successful show salesman, Nike Founder Phil Knight will reportedly construct a building for the University of Oregon's athletic department. Knight's company will build the Academic Learning Center for Student Athletes, a 35,000-square-foot building. Knight, Oregon's biggest booster, will give ownership of the building to the university once the project is completed. However, as part of the deal, Oregon will be required to run the center "at the leading edge of excellence," "substantially expand" personnel, "exceed nationally accepted staffing ratios," and make "a significant investment in technology."

FGCU Reinstates Softball Coach

Florida Gulf Coast University has reinstated a softball coach, who days before had been accused of assaulting player. The coach, Dave Deiros, was initially suspended last month after senior catcher Roz Tyre had accused him of grabbing her twice by her chest protector after she said she didn't want to take part in catching drills because of a sore arm during a practice. Tyre went so far as to file a report with campus police after the incident. The school suspended the coach and conducted an internal investigation. After reviewing the findings, FGCU Athletic Director Carl McAloose reinstated the coach and issued a written reprimand, which read, in part, that: "placing your hand on a student-athlete's chest protector is not acceptable behavior.

Settlement Reached Between Downtown Atlantic Club and Dick Butkus

The Downtown Athletic Club of Orlando has reached a settlement with Hall of Famer Linebacker Dick Butkus, which calls for it to surrender the rights to presenting the Butkus Award to college football's top linebacker. The agreement resolves a year-long trademark fight. Butkus filed a law suit last year, claiming that the Orlando club didn't raise enough money for its charitable causes or for his. He also rescinded rights to his name and likeness. Last month, a federal judge from the Central District of California issued a partial summary judgment in Butkus' favor. The judge also ruled that DACO was responsible for Butkus' legal fees, which had soared to more than $200,000. The settlement relieved DACO from paying Butkus' legal costs and gave the club permission to use Butkus' name in conjunction with two other fundraising events, an annual golf tournament and a growing Pop Warner football program. Butkus was represented by attorney Robert F. Helfing.

COIA Wants Athletic Departments To Improve Course Monitoring

The Coalition on Intercollegiate Athletics, a faculty-based organization partnered with the NCAA, has issued a call for athletic departments to be more diligent about ensuring that student-athletes take appropriate courses. Specifically, COIA wants universities to adopt a proposal to collect data on enrollment and grading patterns of student-athletes to prevent situations where student-athletes take easy classes to remain eligible. "(S)uch data should be designed to reveal whether there are clusters of athletes enrolled in identical courses or in courses with identical instructors, unusually high class GPAs in such courses or from such instructors, or grades significantly higher than predicted for athletes as compared to others in such courses or from such instructors."

JC Will Initiate Women's Wrestling Program

Jamestown College will start a women's wrestling program, the school announced last month. The Jimmies already had 11 athletes signed up when they made the announcement. Men's Coach Cisco Cole will coach the team. "Since adding men's soccer two years ago, we have been evaluating possibilities for a new women's sport, and we are excited to lead the way in this region with women's wrestling,"

said Jamestown College president Robert S. Badal. "We anticipate the addition of more teams in the years ahead and the opportunity to compete in Canada and the U.S." There are currently eight other colleges in the U.S. that offer women's wrestling, including NAIA schools Cumberlands (Ky.), Oklahoma City University, Missouri Valley, Menlo (Calif.) and Missouri Baptist. Other schools with programs include Northern Michigan, Pacific (Ore.) and Yakima Valley CC (Wash.). Wisconsin-River Falls has a club program. In addition, there are 15 colleges in Canada that have teams.

Report: Tennessee Sent Letter in 2006 Alleging UConn Violations

ESPN.com reported last month that the University of Tennessee accused the Connecticut women's basketball program of "a pattern of violating NCAA rules, including allowing former players to practice with the team on a regular basis, arranging a tour of ESPN for a highly touted recruit and permitting former players to serve as recruiters." The charged was leveled in a letter that was sent to the Southeastern Conference in July 2006. In response to the report, UConn issued the following statement: "The allegations received from the SEC produced only one highly publicized result. The NCAA and UConn both consider the matter closed and that has been shared with the SEC." ■

Amateurism Discussed at Symposium

Continued from Page 4

Monasch was central to another story line that emerged during the symposium, concerning whether today's college athlete are truly amateurs, or not by virtue of the scholarship they receive. Monasch maintained that the scholarship was a valuable commodity. He had the support of Bevilacqua, who used to be a wrestler at Penn State University.

Birch empathized with athletes and the level of scrutiny they must endure. He noted that if actor Kiefer Sutherland is arrested for a DUI, he isn't suspended by the network from a few episodes of his hit show "24." An athlete, by contrast, would typically face an immediate suspension.

Birch also spoke of the indignity an athlete faces when being drug tested in front of witnesses.

In addition, he highlighted the double standard that athletes face when using performance enhancing drugs. He noted that newscasters use Botox to improve their appearance, which sets a bad example for young people, and yet they are not penalized for using such drugs. Athletes face punitive penalties for using them. To be fair, Birch was not suggesting that penalties for steroid use be modified, only that professional athletes sacrifice and earn their compensation. ■

Personnel Moves

Longwood University announced that **Troy Austin**, a former Duke football player who has acted as Longwood's interim athletic director since August 2006, has been named AD. He will continue to oversee the school's 14 athletics team, which underwent an NCAA Division I Reclassification during the 2006-7 school year.

Effective July 1, 2008, **Corey Borchardt**—the first ever Upper Midwest Athletic Conference Sports Information Director—will become the conference's first full-time Commissioner. He replaces Jim Unke, who served as part-time commissioner for 10 years.

Jeff Compher will replace Jim Phillips as Northern Illinois University's AD. He comes from the University of Washington, where he was in charge of the athletic department's day-to-day operations with direct oversight of football and men's basketball.

Former Buffalo Bill, **Joe Cribbs**, has accepted a position at the helm of the United National Football League, a developmental league scheduled to start play in January 2009. He previously held a position with the All American Football League, but when its debut was postponed to April 2009, he was let go. The Connecticut-based UNFL hopes to compliment the NFL, Cribbs said, pointed towards fans who crave more football.

Stacy L. Danley II will be moving from Auburn to Tuskegee, Alabama, as he has accepted the AD position at Tuskegee University. The former associate AD/men's athletics coordinator at Auburn University will oversee 12 athletics programs at Tuskegee—a member institution of the Southern Intercollegiate Athletics Conference.

University of North Dakota athletic director position will be filled by **Brian Faison**, the school's vice president announced. Faison, who was formerly Special Assistant to the President and Major Gifts Officer at New Mexico State University, assumed his post in late April, replacing co-acting ADs Betty Ralston and Steve Brekke.

Former Missouri gymnastics stand-out and 2006 Big XII Conference Female Sportsperson of the Year, **Jodie Heinicka**, was appointed Senior Women's Administrator at Northwestern State University. She replaces Julie Lessiter, who stepped down to enter private business early this year. ■

New Conduct Policies Set to be Implemented at Missouri State University

A broad panel of academicians, attorneys, student athletes and athletic department officials at Missouri State University has recommended a student athlete-conduct policy that would require uniform punishment for serious criminal offenses.

The panel was formed in November after a spate of highly publicized criminal incidents brought negative publicity to the university and its athletic department.

In response to these incidents, MSU President Michael T. Nietzel initiated the formation of panel that would receive the following four-point charge:

- Examine our policies and practices to determine how well we are communicating our standards and expectations for appropriate behavior by our student-athletes, beginning with recruiting and continuing through competition at Missouri State.
- Examine our policies and practices for monitoring behavior of student athletes to enable and ensure as high a level of compliance with expectations as possible.
- Examine our policies and practices to determine if we are adequately prepared to react to different levels of legal involvement that a student athlete may encounter, ranging from arrest, to facing criminal charges, to being convicted of a crime.
- Examine our policies and practices regarding how we respond to requests for public information and/or comment about students who may find themselves in potential legal jeopardy.

The most significant recommendation by the panel was to establish a threshold, where a decision of discipline would no longer be left to the head coach.

"If a player is arrested in 'sport A' for a felony and a player is arrested in 'sport B' for a felony, it's recommended that the same sanctions apply," said Dr. Bruce Johnson, Professor of Agriculture, Athletics Representative and chairperson of the panel.

The panel modeled its code of conduct after one used by Fresno State University, which left coaches with the authority to implement discipline for lesser violations.

There were two other significant recommendations, according to Johnson.

- Introduction to rules: All coaches should hold an orientation session with student-athletes shortly after their arrival on campus.
- Point of contact: When an athlete is involved in an issue categorized as being serious under the overall policy, the initial spokesman will be the director of athletics.

The new policies are scheduled to be implemented by Aug. 1.

Aside from Johnson, the rest of the committee included:

- Jodie Adams, Director of Parks, Springfield-Greene County Park Board
- Kellington Boddie, student-athlete
- Larry Catt, Attorney at Law, Catt, Cole, & Martin
- Casey Comoroski, Associate Director of Athletics/Senior Woman Administrator (SWA)
- Don Hendricks, Director of University Communications
- Mr. Michael Jungers, Associate Dean of Students
- Dr. Tom Kane, Professor of Psychology and chair of the Faculty Senate
- Michelle Nahon, Attorney at Law
- Miles Sweeney, Retired Senior Circuit Judge

For more details on the report and recommendations, visit:

http://www.missouristate.edu/athleticsreview/report.htm ■

Jerry Jones Will Give Keynote Address at Upcoming NACDA Convention

The National Association of Collegiate Directors of Athletics (NACDA) has announced that Jerry Jones, Owner, President and General Manager of the Dallas Cowboys, will give the association's keynote address at the 43rd Annual NACDA Convention, which will be held Monday-Thursday, June 9-12, at the Hilton Anatole Hotel in Dallas.

Jones, who will give the Keynote Address on Tuesday, June 10 at 8 a.m., took over as general manager of the club in 1989, becoming the first owner in NFL history to guide his team to three league championships in his first seven years of ownership (1992, 1993, 1995).

In 2009, the new Dallas Cowboys Stadium is scheduled to open for the 2009 NFL season in Arlington, Texas. The Cowboys new home will serve as a catalyst to attract a wide range of national and international events that will help define North Texas. Following the 2010 NFL season, the Dallas Cowboys Stadium will host Super Bowl XLV.

Jones serves on various NFL committees, including Management Council Executive Committee, the Broadcast Committee, the Special Committee on League Economics and the Los Angeles Stadium Working Group. Jones was also on the committee that landed current NFL Commissioner Roger Goodell in September 2006. ■