

## **Speaking in Tweets and Other Social Media: Should Some Written Communication Be Considered Oral Communication?**

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The increasingly prevalent use of social media raises new questions related to contract formation. In her article Kristen Chiger gives examples of many classic contract cases and principles that the courts may use as precedent to help establish when a contract should be binding if negotiated or offered through social media.<sup>2</sup> One of the author's examples of a contract being formed on social media was in *Augstein v. Leslie*, in which the court used the precedent set by traditional contract law cases to establish that reward offers may be binding when conveyed through Twitter.<sup>3</sup> In the case of *Augstein*, the offer was a million dollar reward for the return of a laptop.<sup>4</sup>

The author also mentions that the courts are evolving contract law to recognize the modern context of social media and the different forms of communication used to form contracts with each other. The case that the author points to,

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<sup>1</sup> Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2014 exp.).

<sup>2</sup> See *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 251 Minn. 188 (1957) (Holding that a newspaper advertisement that was clear, definite, explicit, and left nothing open for negotiation was entitled to perform their offer); See also, *Lucy v. Zehmer*, 196 Va. 493 (1954) (Holding that if evidence showed that the contract entered into for the purchase of property was a serious business transaction, the purchasers were entitled to specific performance).

<sup>3</sup> See *Augstein v. Leslie*, No. 11 Civ. 7512 HB, 2012 WL 4928914, at \*2 (S.D.N.Y. Oct. 17, 2012)

<sup>4</sup> See Rob Markman, *Ryan Leslie Sued For \$1 Million Over Laptop Reward*, MTV.com (Oct. 26, 2011, 6:01 PM), <http://www.mtv.com/news/articles/1673241/ryan-leslie-laptop-lawsuit.jhtml>.

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*CX Digital Media v. Smoking Everywhere, Inc.*,<sup>1</sup> may hold precedential value when looking at how contracts are made or altered through social media and Twitter. In this case, Smoking Everywhere Inc. failed to pay CX Digital Media for sales they brought the company that were not compliant with the original contract.<sup>2</sup> CX Digital Media, however, were able to prevail on their claim for damages because they were able to show that the parties had altered the original contract. What makes this case unique is that all of the alterations to the contract that the court found contractually binding were made entirely through instant messaging conversations between the parties.<sup>3</sup> As more business is done electronically, allowing contract modifications through instant messaging and Twitter has major implications for how businesses can communicate through social media. Allowing contracts to be altered, and perhaps made, through instant messaging could allow for faster transactions and greater flexibility in business contracts made around the world. However, it may also lead to situations in which parties believe they are merely discussing or negotiating a contract when in fact they are being bound by the terms they are stating in an instant messaging conversation. With that in mind, it is important for the courts to continue to clarify how instant messaging will be perceived by the court in contract negotiations.

The conclusion that the court came to in *CX Digital Media* seems to ignore the way that people think of instant messaging and the purpose of its use. Although instant messaging and tweeting are written forms of communication, they are increasingly used as, and function as, a replacement for oral communications. Although the end result of *CX Digital Media* is in line with recognizing instant messaging,

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<sup>1</sup> See generally *CX Digital Media v. Smoking Everywhere, Inc.*, No. 09–62020–Civ., 2011 WL 1102782 (S.D.Fla. Mar. 23, 2011).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

and possibly the use of Twitter, as oral communication, the court does so in a way that is less definitive and is less likely to have precedential value.

One of the main issues of contention in *CX Digital Media* was that the contract only allowed changes to be made in writing signed by both of the parties, also known as a “no oral-modification clause” or a signed-writing clause.<sup>4</sup> However, the mere presence of these signed-writing clauses does not necessarily make subsequent agreements void if they are not signed written agreements. “[A] written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement.”<sup>5</sup> In order to resolve this issue, the court applied a common law doctrine that allows oral agreements to modify a contract and be binding on the parties.<sup>6</sup> This is complicated, however, by the determination that instant messaging was an unsigned written agreement.<sup>7</sup> Thus, instead of determining that instant messaging acted as an oral conversation, the court expanded the common law principle of oral agreements to unsigned writing as well.<sup>8</sup> Fortunately, this expansion of the common law doctrine for oral agreements does not seem to give a bright line rule for contractual agreements in the future and may not extend past the district court of Florida in which the *CX Digital Media* case was decided.

While instant messaging and tweets are written forms of communication, they seem to act as a replacement for oral communication in ways that other written forms, such as letters, emails, or contracts, do not. This is because instant messaging typically functions in a synchronous way that

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<sup>4</sup> Ibid., \*9.

<sup>5</sup> Ibid., \*11-12. (citations omitted).

<sup>6</sup> Ibid., \*12 (“They may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement.”) (citations omitted).

<sup>7</sup> Ibid.

<sup>8</sup> Ibid. (“In this case, the modification was not oral, but appeared in writing in an instant-message conversation. Nevertheless, the same principle applies to this informal, unsigned writing as to an oral modification.”).

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mimics oral conversations and is treated or portrayed as substitute speech. AOL is famous for showing the message that “You’ve Got Mail” accompanied by images of letters in one’s virtual mailbox or writing a letter when writing an email.<sup>9</sup> Meanwhile, modern forms of text messaging are portrayed with speech bubbles from one person to another.<sup>10</sup> In fact, before changing its name to “Google Hangouts,” Google’s instant messaging platform was called “Google Talk.”<sup>11</sup> Thus, while email is shown as something analogous to writing a letter, instant messaging is portrayed as being analogous to speaking with someone. This shows that the public perceives instant messaging to be more similar to oral communication than written communications. These perceptions effect the different ways that these mediums of communication are designed and used.

Another major difference between instant messaging and email is the notion of presence within a mode of communication.<sup>12</sup> When people are logged into their instant messaging server, they can see when other people in their instant messaging network are also logged in.<sup>13</sup> This allows them to have instant “real-time communication” with those people who are online and communicate in a way that is

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<sup>9</sup> See You’ve Got Mail email essentials, AOL, <http://help.aol.com/help/microsites/microsite.do?cmd=displayKC&docType=kc&externalId=221656> (last visited Oct. 20, 2013).

<sup>10</sup> See Messages, APPLE, <http://www.apple.com/ios/messages/> (last visited Oct. 20, 2013); See also Google + Hangouts, <http://www.google.com/hangouts/> (last visited Oct. 20, 2013).

<sup>11</sup> See Ryan W. Neal, Google Drops Private Chat: New Hangouts Platform Replaces Talk, Removes Privacy Options, INTERNATIONAL BUSINESS TIMES (May 24, 2013, 3:08 PM), <http://www.ibtimes.com/google-drops-private-chat-new-hangouts-platform-replaces-talk-removes-privacy-options-1278859>

<sup>12</sup> See Frequently asked questions about Instant Messaging, NATIONAL ARCHIVES, <http://www.archives.gov/records-mgmt/initiatives/im-faq.html#differ> (last visited Oct. 20, 2013).

<sup>13</sup> Ibid.

much more in line with oral forms of communication. This is contrasted with most written communication forms which are asynchronous. In other words, they are sent to the other party without knowing when they will read it and without the expectation of an instantaneous response as in a telephone or instant message conversation.

The author believes that many of the questions regarding these modern forms of written communication may be answered through making alterations to already existing legislation regarding contract formation over the Internet. As the author mentioned, this would be done through amendments to the Electronic Signatures in Global and National Commerce Act (“E-Sign”) and the Uniform Electronic Transactions Act (“UETA”). If this is the case, the legislation should be amended to consider texts and tweets as oral forms of communication. This amendment to the legislation would help courts evolve contract law in a way that conforms more fluidly with the way in which social media is both portrayed and used. More importantly, such an amendment would give parties bright line guidance that is directly in line with the common law rule that oral communications may be sufficient to overrule conditions of a contract that are written, regardless of a signed-writing clause.<sup>14</sup> Such legislative clarification is an effective and necessary way to give parties entering into a contract more confidence in how they may communicate and interact over social media.

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<sup>14</sup> CX Digital Media v. Smoking Everywhere, Inc., No. 09–62020–Civ., 2011 WL 1102782, \*11-12 (S.D.Fla. Mar. 23, 2011).

# The Show-Cause Penalty and the NCAA Scope of Power

Jordan Kobrtiz and Jeffrey Levine

The integrity of the National Collegiate Athletic Association (the “NCAA” or “the Association”) is in the media’s crosshairs for the NCAA’s inability to regulate college athletics. Most recently, questions concerning the NCAA’s ability to protect the ivory gates of college athletics stemmed from two major scandals that rocked the nation in 2011: (1) disgraced Ponzi scheme perpetrator Nevin Shapiro’s alleged big money involvement with the University of Miami athletics department, and (2) the allegations of child abuse against former Penn State football coach Jerry Sandusky. Both scandals were unique and merited completely different responses from the NCAA. During the year these scandals broke, the NCAA’s enforcement staff was encouraged to “be innovative and deliver significant [infractions] cases,”<sup>1</sup> which the Shapiro and Sandusky cases certainly became. However, both cases would become symbols of the NCAA’s archaic nature, highlight questionable investigation/enforcement tactics, and create a growing sentiment that the NCAA lacks fundamental fairness.<sup>2</sup>

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<sup>1</sup> Tom Farrey, *Miami seeks unprecedented request*, ESPN.COM (Apr. 4, 2013, 2:05 PM), [http://espn.go.com/espn/otl/story/\\_/id/9131418/miami-writes-ncaa-division-committee-infractions-requests-dismissal-infractions-case](http://espn.go.com/espn/otl/story/_/id/9131418/miami-writes-ncaa-division-committee-infractions-requests-dismissal-infractions-case).

<sup>2</sup> See *Golfer penalized for washing car*, ESPN.COM (May 30, 2013, 4:04 PM), [http://espn.go.com/college-sports/story/\\_/id/9325352/ncaa-penalizes-golfer-washing-car](http://espn.go.com/college-sports/story/_/id/9325352/ncaa-penalizes-golfer-washing-car); see also Pat Borzi, *Minnesota Wrestler Loses His Eligibility by Selling a Song*, THE NEW YORK TIMES (Feb. 27, 2013), [http://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html?\\_r=0](http://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html?_r=0); see also Gregg Clifton, *Despite Missteps in Miami Investigation, NCAA Will Proceed Against School and Others*, COLLEGIATE & PROF. SPORTS L. BLOG, (Feb. 19, 2013).

These complaints have dogged the NCAA, a non-profit membership entity that champions amateurism and was created to safeguard the sanctity of college athletics.<sup>1</sup> However, no prior scandal has been as polarizing as Sandusky. Penn State was unique. It was not so much a sports scandal as a visceral issue that transcended sport, thereby drawing national attention from all the mainstream media outlets. Shortly after the Sandusky scandal broke, NCAA President Mark Emmert promised a swift investigation and guaranteed that appropriate action would be taken against those involved.<sup>2</sup> However one question that would eventually come up is whether the NCAA even possesses the power to deal with a situation as unique as the Sandusky scandal. The debate has centered on the nature of the NCAA's power to impose sanctions and punishment, and on whom.

The NCAA maintains that it uses its power to protect the students of its member institutions, to fulfill its mission of being an integral part of higher education, and to focus on the

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<sup>1</sup> See *History*, NCAA (Aug. 13, 2012)

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/History> [herein after *NCAA History*].

<sup>2</sup> See Kevin Armstrong, *NCAA President Mark Emmert will launch own investigation into alleged Jerry Sandusky sex-abuse case at Penn State*, THE NEW YORK DAILY NEWS (Nov. 10, 2011), <http://www.nydailynews.com/sports/football/ncaa-president-mark-emmert-launch-investigation-alleged-jerry-sandusky-sex-abuse-case-penn-state-article-1.975384>; see also Genaro C. Armas, *NCAA taking up Penn State scandal*, ASSOCIATED PRESS (Nov. 18, 2011), [http://www.boston.com/sports/colleges/football/articles/2011/11/18/ncaa\\_1\\_aunching\\_investigation\\_of\\_penn\\_state/](http://www.boston.com/sports/colleges/football/articles/2011/11/18/ncaa_1_aunching_investigation_of_penn_state/); <http://www.usnews.com/news/articles/2011/11/18/ncaa-launches-investigation-over-penn-state-abuse-allegations> see also Greg Bishop, *Tumultuous Days for N.C.A.A.'s President as the Calls for Reform Grow Louder*, THE NEW YORK TIMES (Feb. 27, 2013), [http://www.nytimes.com/2013/02/28/sports/ncaafootball/calls-for-reform-grow-louder-for-ncaa-and-mark-emmert.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/28/sports/ncaafootball/calls-for-reform-grow-louder-for-ncaa-and-mark-emmert.html?pagewanted=all&_r=0).

development of student-athletes.<sup>3</sup> While a robust debate exists concerning whether the NCAA adheres to its alleged mission statement,<sup>4</sup> the NCAA clearly sees that maintaining the integrity of the sports it administers as paramount to its mission of protecting and developing student-athletes.<sup>5</sup> It is also clear that matters related to recruitment, compliance, boosters, or competitive advantage are within the NCAA's purview to regulate.<sup>6</sup> The question becomes whether the NCAA's regulatory authority extends to the activities that occurred at Penn State.

This note will briefly outline the history of the NCAA, review pertinent sections of Bylaw 19, and explore how key court decisions enable the NCAA to discipline schools that violate its rules. The authors will also examine the scope and range of power the NCAA wields as it relates to rule violators or perceived violators. Finally, this piece will advocate that the NCAA, if it wishes to be perceived as operating more fairly and equitably, must embrace a number of significant reforms including holding member presidents, athletic directors, and other senior university personnel accountable for violations of the principle of institutional control.

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<sup>3</sup>Office of the President, *On the Mark*, NCAA.ORG (Oct. 5, 2010) <http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/On+the+Mark>.

<sup>4</sup> See Daniel Uthman, *Paterno family, former Penn State players sue NCAA*, USA TODAY (May 30, 2013) <http://www.usatoday.com/story/sports/ncaaf/2013/05/29/paterno-family-to-file-lawsuit-against-ncaa-fir-false-assumptions/2371279/> (Plaintiffs' attorney claimed that the lawsuit "is further proof that the NCAA has lost all sense of its mission); see also Reg Henry, *NCAA out of bounds in limiting athletes*, THE PITTSBURGH POST-GAZETTE (June 1, 2011) <http://www.post-gazette.com/stories/opinion/reg-henry/ncaa-out-of-bounds-in-limiting-athletes-300167/>.

<sup>5</sup> Office of the President, *supra* note 5.

<sup>6</sup> See 2012–2013 NCAA DIVISION I MANUAL (2013) [hereinafter NCAA MANUAL].



## History

The NCAA is a voluntary association founded in 1906 for the purpose of organizing and overseeing intercollegiate athletics.<sup>7</sup> It was created at the urging of President Theodore Roosevelt who had invited leaders from college athletics to attend a summit at the White House to discuss college sports reform.<sup>8</sup> Specific issues included major safety concerns within college football<sup>9</sup> and amateurism issues related to all college sports.<sup>10</sup> Football games were so violent and players so unprotected that severe injury or even death was commonplace.<sup>11</sup> The sport was in danger of being abolished by many schools.<sup>12</sup> As a result of this summit, sixty-two schools agreed to form the Intercollegiate Athletic Association of the United States (IAAUS).<sup>13</sup> Four years later, the IAAUS changed its name to the NCAA.<sup>14</sup>

The original role of the NCAA was to create a uniform set of rules and to provide a forum for teams to address problems.<sup>15</sup> However, as the complexities of major intercollegiate sport grew, the NCAA's role in college athletics has at times become muddled. Today, the Association's function vacillates between championing amateurism for its members and embracing commercialism, thus belying its original intention. Despite several periods of reform, which resulted in dramatic expansion of its power,<sup>16</sup> the Association has historically been plagued by rule

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<sup>7</sup> NCAA HISTORY, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> *See id.* (Football was beginning its rise in popularity and was marred by gang tackling, violent collisions and serious injuries, including deaths of players).

<sup>10</sup> *See id.* (Oftentimes, nonstudents were paid to play for college sports teams).

<sup>11</sup> NCAA HISTORY, *supra* note 3.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

violations and other alleged improprieties involving amateurism.<sup>17</sup> In an effort to punish rules violators, and to discourage future rules violations, the NCAA has used, somewhat erratically, what is known as the “show-cause penalty.”

### **NCAA Bylaws**

The centerpiece of the NCAA’s rulebook and bylaws is the principle of institutional control and responsibility.<sup>18</sup> “It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The *institution’s president or chancellor is responsible for the administration of all aspects of the athletics program*... (emphasis added).”<sup>19</sup> According to this rule, the chief executive of the university bears the ultimate responsibility for NCAA compliance in all athletics matters.<sup>20</sup> However, the rule of institutional control applies beyond the president or chancellor’s office.

The university is also responsible “for the conduct of its intercollegiate athletics program...[and is] responsib[le] for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution.”<sup>21</sup> Thus, under NCAA rules, a university and its senior administrative/athletics personnel are also responsible for the actions of all individuals either employed or affiliated with the university, including boosters. This considerable responsibility is placed on senior university leaders, many of whom are unfamiliar with the gray areas and potential mine

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<sup>17</sup> See generally *Chronology of Enforcement*, NCAA.ORG (Jan. 21, 2013) <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Resources/Chronology+of+Enforcement>.

<sup>18</sup> NCAA MANUAL, *supra* note 8, at Rule 2.1.

<sup>19</sup> *Id.* at 2.1.1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

fields within the administration of intercollegiate athletics. Many of these administrators are ill equipped to prevent or effectively confront the violations that inevitably emerge, violations that are thought to be part and parcel of the success within NCAA athletics.

The Association's enforcement program's stated mission is to eliminate NCAA rules violations and impose appropriate penalties.<sup>22</sup> Article 19 of the NCAA bylaws discusses the enforcement program.<sup>23</sup> One of the most important sections of this bylaw is Article 19.01.3.<sup>24</sup> This rule obligates all representatives of member institutions to fully cooperate with the NCAA enforcement staff.<sup>25</sup> The responsibility to cooperate with NCAA enforcement policies is an essential part of the athletics program of each member institution.<sup>26</sup> Moreover, the NCAA requires full and complete disclosure by all institutional representatives of any relevant information requested by the NCAA enforcement staff.<sup>27</sup> This responsibility applies to both the member institution as well as the staff members of such institution.

Bylaw 19.01.4 addresses violations by institutional staff members.<sup>28</sup> "Institutional staff members found in violation of NCAA regulations shall be subject to disciplinary or corrective action as set forth in the provisions of the NCAA enforcement procedures, whether such violations occurred at the certifying institution or during the individual's previous employment at another institution."<sup>29</sup> Thus, it is clear that institutional employees cannot avoid sanctions from the governing body merely by abandoning one institution for another.

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<sup>22</sup> *Id.* at 19.01.01.

<sup>23</sup> *Id.* at 19.

<sup>24</sup> *Id.* at 19.01.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 19.01.04.

<sup>29</sup> *Id.*

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NCAA regulators have divided violations into two types: secondary and major violations.<sup>30</sup> (Note: Effective August 1, 2013, the NCAA will implement a four-level violation structure for infractions.<sup>31</sup>)

“A secondary violation is a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid). Multiple secondary violations by a member institution may collectively be considered as a major violation.”<sup>32</sup>

A secondary violation may be penalized through the use of any of the disciplinary measures outlined at Bylaw 19.5.1(a) through Bylaw 19.5.1(i).<sup>33</sup> Potential penalties include: termination of the recruitment of a prospective student-athlete by the institution, forfeit/vacate contests in which ineligible student-athlete participated, prohibition of head coach and/or staff members from recruiting activities for up to one year, the suspension of the head coach or staff members for one or more competitions, and the show-cause penalty.<sup>34</sup>

NCAA Bylaws currently define a major violation as all violations other than secondary violations, specifically

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<sup>30</sup> *Id.* at 19.02.2.

<sup>31</sup> See Gary Brown, *Board adopts tougher, more efficient enforcement program*, NCAA.ORG (Oct. 30, 2012) <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/October/Board+adopts+tougher+more+efficient+enforcement+program>.

<sup>32</sup> NCAA MANUAL, *supra* note 8, at Rule 19.02.2.1.

<sup>33</sup> *Id.* at 19.01.05.

<sup>34</sup> *Id.* at 19.5.1(a)-19.5.1(i).

including those that provide an extensive recruiting or competitive advantage.<sup>35</sup> This category comes with a list of prescribed disciplinary measures.<sup>36</sup> The Association's bylaws note that "[p]enalties for a major violation shall be significantly more severe than those for a secondary violation[.]"<sup>37</sup> Some of the disciplinary measures for major violations include the "suspension of institutional staff members from their duties for a specified period,"<sup>38</sup> "reduction in the number of financial awards,"<sup>39</sup> limits on recruiting activities, vacation of records in a case in which a student athlete has competed while ineligible, financial penalties, and prohibition against television appearances of the institution in the sport in which the violation occurred.<sup>40</sup> While the range of punishments is substantial, one additional tool is increasingly being used as the remedy of choice.

One of the most important disciplinary measures prescribed by the NCAA Committee on Infractions may be the show cause penalty. This includes a

[r]equirement that an institution that has been found in violation, or that has an athletics department staff member who has been found in violations of the provisions of NCAA legislation while representing another institution, show cause why a penalty or additional penalty should not be imposed, if, in the opinion of the Committee on Infractions, the institution has not taken appropriate disciplinary or corrective action against athletics department personnel involved in the infractions case or any other

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<sup>35</sup> *Id.* at 19.02.2.2.

<sup>36</sup> *See id.* at 19.5.2.

<sup>37</sup> *Id.* at 19.5.2.

<sup>38</sup> *Id.* at 19.5.2 (o)

<sup>39</sup> *Id.* at 19.5.2 (h)

<sup>40</sup> *Id.* at 19.5.2 (a)-(l).

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institutional employee, if the circumstances warrant, or a representative of the institution's athletic interests.<sup>41</sup>

The NCAA defines the phrase "appropriate disciplinary or corrective action" to include

severance of relations with any representative of the institutions athletics interest who may be involved; the debarment of the head coach or any assistant coach involved in the infraction from coaching, recruiting, or participation in speaking engagements; and the prohibition of all recruiting in a specified sport for a specified period.<sup>42</sup>

Per the agreement between the participating institution and the NCAA, the NCAA possesses the ability to discipline institutions that do not comply with the governing body's rules.<sup>43</sup> However, the NCAA has no authority to sanction a member institution's employees directly.<sup>44</sup> Realizing this, the NCAA often uses indirect sanctions, like a show-cause penalty, to indirectly force institutions to terminate rules violators. As a result, some university officials facing discipline stemming from the NCAA's show cause order have attempted to avoid punishment by invoking their constitutional rights.<sup>45</sup> In attempting to do this, the employee typically argues that he or she has been deprived of a property interest<sup>46</sup> without due process of the law.<sup>47</sup> Under the case

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<sup>41</sup> *Id.* at 19.5.2(k).

<sup>42</sup> *Id.* at 19.5.2(k)(2).

<sup>43</sup> *Id.* at 2.8.

<sup>44</sup> *See Id.* at 19.02.1.

<sup>45</sup> *See generally* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

<sup>46</sup> *Id.* Sometimes aggrieved parties may argue that their reputation has been damaged.

<sup>47</sup> *Id.* at 181.

law examined herein, this argument commonly arises when a university terminates, or is forced to terminate, a coach for allegedly violating an NCAA bylaw. The major criticism against the show cause penalty is that the NCAA has infrequently used it to discipline coaches and has never used it against upper levels of university administration. Those at the highest levels of administration who are ultimately responsible for rules violations have historically been immune from a show cause order.

Despite a number of legal challenges to the show cause penalty, the NCAA continues to utilize it as a remedy. Properly applied, the show cause order has the potential to be a powerful tool against corruption and rule violations.

### **Legal Tests of the Show Cause Penalty**

The heart of the controversy surrounding the show cause penalty is whether a coach or administrator facing a forced ouster from his or her profession for a period of time holds a constitutionally protected right that cannot be deprived without being afforded due process by the NCAA.<sup>48</sup> The seminal case regarding this issue is *NCAA v. Tarkanian*.<sup>49</sup> In this case, the NCAA found the University of Nevada Las Vegas (“UNLV”) to be in violation of 38 bylaws. Ten of those violations were committed by men’s head basketball coach Jerry Tarkanian.<sup>50</sup>

As a result of the violations, the NCAA sanctioned the UNLV men’s basketball program.<sup>51</sup>

One of the sanctions levied against UNLV was a show cause order to determine why additional sanctions should not

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<sup>48</sup> See *id.* at 181.

<sup>49</sup> See *id.* at 179; see also *Arlosoroff v. Nat’l Collegiate Athletic Ass’n*, 746 F.2d 1019, 1020 (4th Cir. 1984).

<sup>50</sup> *Tarkanian*, 488 U.S. . at 185-186. Tarkanian was one of the most successful Division I basketball coaches in the history of the NCAA.

<sup>51</sup> *Id.* at 186.

be imposed upon the team if the university refused to suspend Coach Tarkanian during UNLV's probationary period.<sup>52</sup> UNLV chose to recognize the NCAA's authority to act as the ultimate decision-maker regarding sanctions and thus suspended Tarkanian during the probationary period.<sup>53</sup> In response, Tarkanian filed suit against UNLV alleging he had been deprived of property and liberty without due process of the law.<sup>54</sup> The trial court accepted this argument and enjoined UNLV from suspending Tarkanian.<sup>55</sup>

After some skirmishing at the trial level, and with the NCAA now joined as a necessary party to the litigation,<sup>56</sup> the case made its way to the Supreme Court.<sup>57</sup> The arguments before the Court centered on whether the NCAA's actions constituted "state action," thus requiring due process.<sup>58</sup> This issue was central to the case because "[a]s a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'"<sup>59</sup> The Court sought to determine if the NCAA, a private actor, was disciplining Tarkanian under the color of state law, or whether the show cause order was a private action.

Tarkanian argued that the NCAA was a state actor because it had misused power that it possessed by virtue of state law.<sup>60</sup> In acquiescing to the NCAA and subsequently suspending him, Tarkanian equated UNLV's conduct to a delegation of its public functions to the NCAA, thus "clothing the Association with authority both to adopt rules governing UNLV's athletic programs and to enforce those rules on

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 187.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 188.

<sup>56</sup> *See id.*

<sup>57</sup> *See generally Tarkanian*, at 182.

<sup>58</sup> *Id.* at 189-99.

<sup>59</sup> *Id.* at 191 (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

<sup>60</sup> *Id.* at 191-92.



behalf of UNLV.”<sup>61</sup> However, the Court disagreed with Tarkanian’s assertions, opining that his argument fundamentally misconstrued the facts.<sup>62</sup>

To resolve this dispute, the Court looked to precedent to determine whether UNLV was sufficiently involved with the NCAA to treat the decisive conduct as state action.<sup>63</sup> The Court asked “whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.”<sup>64</sup> Although the Court determined that UNLV was acting under the color of state law, the NCAA’s status as a potential state actor was less clear.<sup>65</sup> UNLV had delegated no true authority to the NCAA to take specific action against a university employee.<sup>66</sup> In fact, UNLV even retained the authority to withdraw from the NCAA if it so chose.<sup>67</sup> The NCAA’s greatest authority was to simply threaten sanctions against UNLV itself through a show-cause penalty or by other measures up to and including expelling UNLV from the Association.<sup>68</sup>

Tarkanian argued that UNLV possessed no practical alternative to complying with NCAA rules, which placed the real decision-making power for personnel decisions in the hands of the Association.<sup>69</sup> In response, the Court posited that the true final question is whether “the conduct allegedly

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<sup>61</sup> *Id.* at 192. Moreover the Nevada Supreme Court had previously held that UNLV had delegated its authority of personnel decisions to the NCAA, thus buttressing Tarkanian’s argument (*see id.* 191-92).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 192 (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (stating “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself”)).

<sup>65</sup> *See id.* at 193.

<sup>66</sup> *Id.* at 195-96.

<sup>67</sup> *Id.* at 198.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.* at 198.

cause[d] the deprivation of a federal right [which can] be fairly attributable to the State.”<sup>70</sup> In rebutting this argument, the Court stated that it would be “ironic” to find the NCAA’s sanctions to be state action since a number of UNLV’s supporters were affiliated with the state, including UNLV’s general counsel and the Attorney General of Nevada, who strongly opposed the sanctions.<sup>71</sup> On that basis, the Court held that the Association was not a state actor.<sup>72</sup>

The Court in *Tarkanian* seemed to send a strong, yet befuddling message to those intent on challenging the NCAA’s authority. As long as the Association retains only the authority to make threats, it will not act under color of state law regardless of the gravity of such threats. In making this statement, the U.S. Supreme Court has given the NCAA the authority to regulate college athletics, including disciplining institutional employees indirectly, by threatening sanctions against an institution, without the necessity to provide an invaluable procedural safeguard guaranteed by the Constitution. This precedent granted the NCAA new power and confidence in the use of its show cause penalty.

The NCAA’s use of the show cause order has also been challenged on other grounds.<sup>73</sup> A former assistant coach of the University of Kentucky’s football team, Claude Bassett, filed a complaint against the NCAA, the SEC, and the University of Kentucky Athletic Association (UKAA).<sup>74</sup> In the complaint, Bassett alleged several claims, including one for tortious interference with prospective contractual

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<sup>70</sup> *Id.* at 199 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S. 937 (1982)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (opining it would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law).

<sup>73</sup> See generally *Bassett v. Nat’l Collegiate Athletic Ass’n*, 428 F.Supp.2d 675 (E.D. Ky. 2006), *aff’d* 528 F.3d 426 (6th Cir. 2008).

<sup>74</sup> *Id.*

relations,<sup>75</sup> after he was seemingly forced to resign in the face of allegations of impropriety brought by the NCAA.<sup>76</sup> After Bassett's resignation, the University of Kentucky (UK), along with a representative from the SEC, initiated an investigation of the charges.<sup>77</sup> Individuals from the University as well as representatives of the Southeastern Conference interviewed Bassett as a part of the university's internal investigation of NCAA rules violations.<sup>78</sup> Based on UK's internal investigation, which was submitted to the NCAA, Association enforcement staff issued an official letter of inquiry to Bassett.<sup>79</sup> Bassett, through counsel, refused to be interviewed by the NCAA.<sup>80</sup>

The NCAA released its Infractions Report on January 31, 2002. Bassett's violations of the NCAA rules were deemed so egregious that he was hit with an eight-year show cause order.<sup>81</sup> Thus, between 2002 and 2010, any NCAA member school seeking to hire Bassett would have "to appear before the NCAA infractions committee to consider whether the institution should be subject to the NCAA's show cause procedures."<sup>82</sup> Bassett alleged that this show cause order not only prevented him from seeking employment during the eight year period, but it also rendered him unemployable at any NCAA institution "even beyond the ban."<sup>83</sup>

The crux of Bassett's tortious interference argument was that UK had denied him due process of law during the

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<sup>75</sup> *Id.* Bassett had also alleged antitrust violations, fraud, and civil conspiracy.

<sup>76</sup> *Basset v. Nat'l Collegiate Athletic Ass'n*, No. 5:04-425-JMH, 2006 WL 1312471, at \*1 (E.D. Kentucky Feb. 8,

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Bassett*, 428 F.Supp.2d 675, 679 (E.D. Ky. 2006), *aff'd* 528 F.3d 426 (6th Cir. 2008).

<sup>81</sup> *Bassett*, 5:04-425-JMH, 2006 WL 1312471, at \*1 (E.D. Ky. May 11, 2006).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

institution's investigation, and that the NCAA had relied on the UK investigation when it imposed the eight-year show cause order on him.<sup>84</sup> The court briefly discussed the role of the show cause order.<sup>85</sup>

Several courts have recognized the NCAA's role in college athletics. The NCAA argues that its issuance of a show cause order was entirely proper because, in order to *uphold the purposes* of its association, it must be allowed to *enforce its rules* by penalizing violators. Both UK and plaintiff had agreed to abide by the NCAA's regulations and to report any possible violations to the NCAA (emphasis added) (citations omitted).<sup>86</sup>

Bassett also used his suit as a forum to question the NCAA's enforcement process. In pleadings, the former coach mocked the NCAA for "structuring its enforcement program to 'encourage schools to push all blame upon [their] employees for rules violations'" and for allowing UK to "railroad the coach through its self-investigation."<sup>87</sup> In failing to perform its own investigation and relying on UK's report, which was allegedly filled with "lies and other deceptions" as a bona fide basis to levy discipline, Bassett lost his right of due process. The court found this argument unavailing, taking testimony that illustrated the importance of self-policing by NCAA member schools, since the Association is a voluntary institution.<sup>88</sup> In fact, the court was advised that no specific NCAA bylaw exists "that requires university officials to be evenhanded and fair in the way they conduct

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<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.*

investigations.”<sup>89</sup> Because the plaintiff was aware of the Association’s rules and had admitted to multiple violations,<sup>90</sup> “the NCAA was justified in enforcing those rules through a show cause order” to serve as a deterrent to other individuals who may wish to violate the same rules.<sup>91</sup> Thus, the court was firmly aligned with the NCAA.

*Bassett* illustrates the support the NCAA enjoys from the legal system, which seems unafraid to uphold the show cause orders, harsh though they may be. Read together, *Tarkanian* sanitized the NCAA as a private actor and *Bassett* authorized the show cause penalty’s use stemming from investigations conducted by member institutions without NCAA participation. This staunch support provides the Association with wide latitude to utilize show cause orders; however a question remains as to whether the NCAA is punishing the correct individuals for failing to comply with NCAA bylaws.

A prime example of the NCAA’s practice of targeting lower-level personnel in lieu of high-level administrators is *Ridpath v. Board of Governors of Marshall University*.<sup>92</sup> Here, the court was faced with deciding whether a former NCAA compliance officer at Marshall University was deprived of due process before being reassigned as a result of NCAA sanctions.<sup>93</sup> As “corrective action” for an NCAA violation, Marshall reassigned Ridpath from his position as a compliance officer to another position within the University.<sup>94</sup> The university attempted to frame the reassignment as a remedial act, which it designated as

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 6. He violated the NCAA’s rules on recruiting inducements, impermissible tryouts, falsification of recruiting records, and unethical conduct.

<sup>91</sup> *Id.*

<sup>92</sup> *Ridpath*, 447 F.3d 292 (4th Cir. 2006).

<sup>93</sup> *See id.* at 307.

<sup>94</sup> *Id.* at 301.

“corrective action.”<sup>95</sup> However, Ridpath alleged that the reassignment was performed with little to no procedural safeguards, which allegedly injured Ridpath’s reputation and his ability to pursue work elsewhere as an NCAA compliance officer.<sup>96</sup>

Ridpath successfully asserted a due process claim against the University.<sup>97</sup> As a public institution, Marshall University owed Ridpath due process because the University was a state actor.<sup>98</sup> The holding that due process applies is a key distinction between *Ridpath* and *Tarkanian*. Ridpath certainly should have been given notice and been afforded a hearing by Marshall University before the “corrective action” label was placed upon him; however, because the NCAA is not a state actor, it was neither required to give such notice nor was it required to allow an opportunity to be heard. The NCAA was simply imposing a show cause order, which is seemingly endorsed under the Association’s enforcement policy. One reason for the contrary decisions in *Ridpath* and *Tarkanian* may rest with the plaintiffs involved. Trakanian was a seminal basketball coach who was almost universally revered for his coaching record. Ridpath, on the other hand, was a relatively anonymous compliance professional who lacked both Tarkanian’s power and pedigree.

### **Current Possible Use of a Show Cause Order**

The Supreme Court clothed the NCAA in incredible power through its *Tarkanian* holding. Despite the disagreement in the *Tarkanian* decision, a show cause order operates as a virtual bar of employment for any institutional employee who is forced to wear the NCAA’s equivalent of a scarlet letter. Now the focus becomes how the Association wields its enormous power.

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<sup>95</sup> *Id.* at 302.

<sup>96</sup> *Id.* at 308.

<sup>97</sup> *Id.* at 315.

<sup>98</sup> *Id.*

In the authors' view, the NCAA should be more concerned with the dubious actions of those officials in charge of member institutions, rather than punishing first-line employees or middle managers. One senior official of an NCAA member institution currently under scrutiny is University of Miami ("UM") President Donna Shalala. UM is in the NCAA's crosshairs after the University and a number of its student-athletes allegedly violated numerous NCAA rules by virtue of their relationship with Nevin Shapiro.<sup>99</sup> Apart from the NCAA's Notice of Allegations,<sup>100</sup> other reports have painted an unflattering picture of Shalala's involvement with Shapiro.<sup>101</sup> She willingly accepted donations from Shapiro while turning a blind eye to his illegal activities, actions that should have caught her attention or the attention of other University administrators.<sup>102</sup> Shapiro was also allowed field access during Miami games and was

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<sup>99</sup> Charles Robinson, *Renegade Miami football booster spells out illicit benefits to players*, YAHOO! SPORTS (Aug. 16, 2011), [http://sports.yahoo.com/investigations/news?slug=crenegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611](http://sports.yahoo.com/investigations/news?slug=crenegade_miami_booster_details_illicit_benefits_081611).

<sup>100</sup> See Jorge Milian, *NCAA gives University of Miami notice of allegations; 'lack of institutional control' reportedly among charges*, The Palm Beach Post (Feb. 20, 2013), <http://www.palmbeachpost.com/news/sports/college-football/university-of-miami-receives-notice-of-allegations/nWS56/>.

<sup>101</sup> See Justin Pope, *Scandal threatens Shalala's ambitions at UMiami*, THE SEATTLE TIMES (Aug. 27, 2011, 7:53 AM), [http://seattletimes.com/html/sports/2016031451\\_apusmiamiambitiousshalala.html](http://seattletimes.com/html/sports/2016031451_apusmiamiambitiousshalala.html); see also Francisco Alvarado, *Donna Shalala Must Admit Blame In Nevin Shapiro Scandal or Resign*, THE MIAMI NEW TIMES (Aug. 18, 2011, 8:00 AM), [http://blogs.miaminewtimes.com/riptide/2011/08/donna\\_shalala\\_must\\_admit\\_blame.php](http://blogs.miaminewtimes.com/riptide/2011/08/donna_shalala_must_admit_blame.php).

<sup>102</sup> See Assoc. Press, *Report: Miami ignored Shapiro Acts*, ESPN.COM (Mar. 29, 2013, 6:04 PM), [http://espn.go.com/college-sports/story/\\_/id/9112146/ncaa-alleges-miami-ignored-nevin-shapiro-acts-report-says](http://espn.go.com/college-sports/story/_/id/9112146/ncaa-alleges-miami-ignored-nevin-shapiro-acts-report-says). (stating "[t]he NCAA is alleging that some Miami officials essentially looked the other way when presented with evidence of booster Nevin Shapiro's wrongdoing -- the heart of the lack of the 'institutional control' charge...").

frequently honored in the presence of student-athletes for his contributions to the University. In its Notice of Allegations, the NCAA alleged that “[w]hen put on notice of potential issues with Shapiro’s involvement...the institution failed to limit Shapiro’s access or implement any additional monitoring related to Shapiro.”<sup>103</sup> This lack of oversight created an environment in which Shapiro was able to have impermissible contact with student-athletes.”<sup>104</sup> Although questions have been raised concerning the tactics used by the NCAA during its investigation,<sup>105</sup> the Shapiro scandal illustrates how complacency of NCAA rules can lead to a toxic culture within an athletic program.

The NCAA must take action to effectuate meaningful cultural change at universities where NCAA infractions have become the norm. That change must begin at the top. The NCAA should utilize the show cause order against senior university administrators who, either by action or acquiescence, create a culture that fosters rampant disregard of Association rules.

### **Misdirected Punishments**

The NCAA has used other forms of punishment besides a show cause order to punish universities that have been rule violators.<sup>106</sup> Previous punishments have included fines, vacating wins, suspensions of post season play, and limits on future scholarships.<sup>107</sup> While these remedies overall

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Terez A. Paylor, *Miami’s motion to dismiss Haith case outlines unethical tactics by NCAA*, THE KANSAS CITY STAR (Apr. 4, 2013), <http://www.kansascity.com/2013/04/04/4161851/miamis-motion-to-dismiss-haith.html>.

<sup>106</sup> *See Chronology of Enforcement*, *supra* note 9.

<sup>107</sup> *See Penn State sanctions: \$60M, bowl ban*, ESPN.COM (JULY 24, 2014), [http://espn.go.com/college-football/story/\\_/id/8191027/penn-state-nittany-lions-hit-60-million-fine-4-year-bowl-ban-wins-dating-1998](http://espn.go.com/college-football/story/_/id/8191027/penn-state-nittany-lions-hit-60-million-fine-4-year-bowl-ban-wins-dating-1998) (discussing the penalties levied against Penn State University by the NCAA); *see also* Fact Sheet on Penn State NCAA Sanctions, available at



have hurt an offending school, the individuals most often affected are typically the student-athletes the NCAA allegedly exists to protect or a first line administrator and/or coach with little to no managerial involvement in the alleged infraction. The individuals who truly bear responsibility for the violation typically have the ability to avoid punishment due to their stature. If properly applied, the show cause penalty would transfer the onus of NCAA sanctions from student-athletes to administrators who are ultimately responsible for the rules violations that occur at their institution.

### **Conclusion**

The NCAA views itself as the protector of college athletics. It has promulgated hundreds of pages of rules<sup>T08</sup> which it attempts to enforce by utilizing various sanctions, including the show cause order. The cases discussed above bear witness to the courts' endorsement of the NCAA's virtually unlimited power and authority to impose the show cause penalty.

The Association should properly utilize its authority to effectuate meaningful change. This change starts at the top. Senior university administrators and athletic department personnel are required by NCAA policy to act vigilantly in enforcing NCAA rules and regulations. Correspondingly, they should also be held responsible for compliance violations. Anything less makes a mockery of the governing body's concept of "institutional control."

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[http://progress.psu.edu/assets/content/120803\\_NCAA\\_Sanctions\\_Fact\\_Sheet\\_FINAL.pdf](http://progress.psu.edu/assets/content/120803_NCAA_Sanctions_Fact_Sheet_FINAL.pdf) (last visited Jun. 1, 2013).

<sup>T08</sup> Brian Bennett, *Panel mulls simplifying NCAA rulebook*, ESPN.COM (Aug. 10, 2011), [http://espn.go.com/college-sports/story/\\_/id/6850179/ncaa-member-presidents-discuss-simplifying-rulebook-tougher-penalties](http://espn.go.com/college-sports/story/_/id/6850179/ncaa-member-presidents-discuss-simplifying-rulebook-tougher-penalties).

## **The Current Trend in NCAA Enforcement and How the Show-Cause Order Should be Applied**

*Cole Peterson<sup>1</sup>*

Kobritz and Levine offer a thorough analysis of the significant power the NCAA wields while also acknowledging the NCAA's inadequacy in effectively using this power to protect the integrity of collegiate athletics. Their article appropriately outlines the history of the NCAA and how the Association's great power came to be. This background is helpful to understand where the NCAA enforcement process is at today and where substantial improvements should be made. As the authors adeptly advocate, the only way to eradicate the rampant rules violations throughout collegiate athletics today is to hold the institutional leaders accountable. This could be done through the show-cause order, which has become one of the NCAA's most powerful tools through the decisions in *Tarkanian* and *Bassett*. The application of the show-cause order to senior administrators would likely effectuate significant change, but unfortunately the NCAA's current trend of enforcement suggests this will never occur. The University of Miami sanctions that the authors anticipate were just recently imposed upon the institution. The punishments for UM were all bark and no bite, but that may suggest that the NCAA is trying to create a more equitable system where student-athletes do not take the brunt of the punishment. In order to advance the authors' argument for sanctions against university administrators and to predict the future enforcement landscape, the current trend of the Association needs to be analyzed. NCAA sanctions in recent years have

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<sup>1</sup> Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2015 exp.)

tended to harm the innocent more than the guilty and often vary too much in degree from one institution to another. The sanctions handed down on USC in 2010 illustrate the far-too-often inequitable distribution of punishments and how future student-athletes are punished for their predecessors' misconduct. USC was given a two-year bowl ban and a reduction of thirty football scholarships for rules violations stemming from Reggie Bush's acceptance of impermissible benefits while a student-athlete at USC.<sup>1</sup> Bush's violations largely contributed to the sanctions, as well as additional violations in the men's basketball and women's tennis programs.<sup>2</sup> The excessive reduction in scholarships and postseason bans continue to plague the USC football program, while Reggie Bush and his former USC head coach Pete Carroll enjoy their uninterrupted NFL careers. In its report, the NCAA ruled the USC athletic department exhibited a lack of institutional control.<sup>3</sup> As Kobritz and Levine assert, this principle of institutional control is at the core of the NCAA's bylaws. At the issuance of these sanctions it was widely thought that USC's punishment lacked fundamental fairness, but it was assumed this stiff punishment would deter misconduct by other institutions. This assumption could not have been more wrong, as the NCAA began a method of softening sanctions against future violators, and thus furthering the notion of inequitable punishments.

A softening approach to the imposition of penalties can be seen in the recent sanctions for the University of Oregon. Just this past summer, the NCAA issued an 18-month show-cause order for former Oregon football head

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<sup>1</sup> Charles Robinson, *USC Hit Hard by NCAA Sanctions*, YAHOO! SPORTS (June 10, 2010), <http://sports.yahoo.com/ncaa/football/news?slug=ys-uscpenalties061010>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

coach Chip Kelly, and a one-year show-cause order for the former assistant director of football operations.<sup>4</sup> In addition, the institution was placed on a three-year probation, the football program lost three scholarships, and limitations were put on recruiting services.<sup>5</sup> The sanctions were the result of finding major infractions of NCAA legislation with regard to recruiting services and a failure to monitor by the head football coach and the institution.<sup>6</sup> To make matters worse, Oregon was deemed a repeat violator under NCAA bylaws, which is supposed to warrant stiffer penalties.<sup>7</sup> While the sanctions may slightly hinder the athletic department's goals, they hardly serve as a proper deterrent of misconduct. The show-cause order is inherently powerful but all too easily rendered null, as in the case of Chip Kelly side stepping the effects of his punishment by accepting a head coaching position in the NFL. Perhaps college head coaches will be scared into adherence as a result of Kelly's show-cause penalty, or they may believe that the juice is worth the squeeze if committing violations can lead to career advancement. The most recent NCAA infractions outcome after Oregon will likely continue to foster further unethical conduct in NCAA athletics.

The long awaited sanctions against the University of Miami were handed down this week, further evidencing the NCAA's trend of toothless enforcement. After finding nearly a decade of rampant violations on the part of UM's athletic department, the NCAA decided to give the institution a slap on the wrist instead of using the valuable opportunity to reform and rehabilitate the collegiate athletics landscape.

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<sup>4</sup> *University of Oregon Public Infractions Report*, NCAA 1, 25-26 (June 26, 2013), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2013/university+of+oregon+public+infractions+report>.

<sup>5</sup> *Id.* at 24-25.

<sup>6</sup> *Id.* at 1-2.

<sup>7</sup> *Id.* at 24.

From 2002 to 2010, the NCAA found UM failed to exercise institutional control when it fostered an environment that allowed booster Nevin Shapiro to commit some of the most egregious infractions in recent NCAA history.<sup>8</sup> Shapiro was found over that time frame to have provided numerous student-athletes and prospects with impermissible gifts of cash, clothing, housing, transportation, dinners, yacht outings, VIP nights out at nightclubs and strip clubs, and many other benefits.<sup>9</sup> In addition to the booster's impermissible benefits, the NCAA found rampant recruiting violations;<sup>10</sup> impermissible supplemental pay to assistant coaches;<sup>11</sup> lack of documenting and monitoring of athletics activities;<sup>12</sup> and lack of proper compliance education.<sup>13</sup> Further violations were also found throughout the football and basketball programs of UM in a case that the chair of the NCAA Committee on Infractions described as "among the most extraordinary in the history of the NCAA."<sup>14</sup> The NCAA took into account UM's self-imposed penalties, such as a two-year bowl ban and recruiting restrictions, when handing down sanctions that include a loss of twelve scholarships between football and basketball, a three-year period of probation, two-year show-cause bans for three former assistant coaches, and a five-game suspension for former Hurricane head basketball coach and current Missouri head basketball coach, Frank

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<sup>8</sup> See *University of Miami Public Infractions Report*, NCAA 1, 56 (Oct. 22, 2013), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/PDFs/2013/COI+REPORT+University+of+Miami+lacked+institutional+control+resulting+in+a+decade+of+violations>.

<sup>9</sup> *Id.* at 7-12.

<sup>10</sup> *Id.* at 52-56.

<sup>11</sup> *Id.* at 48-49.

<sup>12</sup> *Id.* at 57-59.

<sup>13</sup> *Id.* at 50, 59.

<sup>14</sup> Tim Reynolds, *Miami's NCAA Saga Comes to an End with Sanctions*, ABCNEWS (Oct. 22, 2013), <http://abcnews.go.com/Sports/wireStory/ap-source-miami-loses-scholarships-years-20644048>.

Haith.<sup>15</sup> As Kobritz and Levine discuss, UM President Donna Shalala willingly accepted donations from Nevin Shapiro while failing to acknowledge the misconduct and to implement a system to prevent such a toxic environment. Although the NCAA was found to have tampered with the investigation, thereby forcing some evidence to be excluded from consideration, the case report reveals plenty of evidence to support the belief that the sanctions were excessively lenient.

In three previous infractions cases between February of 2002 and May of 2003, the committee stated that institutions have a greater obligation to monitor and direct the conduct of an athletics representative with “insider” status.<sup>16</sup> Specifically, in the Alabama infractions case of February 1, 2002, the committee discussed “insider boosters” and an institution’s heightened responsibility to monitor these individuals when the committee wrote the following:

But those athletics representatives provided favored access and “insider” status, frequently in exchange for financial support, are not the typical representative. Their favored access and insider status creates both a greater university obligation to monitor and direct their conduct and a greater university responsibility for any misconduct in which they engage. This case is apt illustration of the unequivocal obligation to monitor closely those athletics representatives whose financial contributions provide a level of visibility, insider status, and a favored access within athletics programs. Their insider status not

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<sup>15</sup> *Id.*

<sup>16</sup> *University of Miami Public Infractions Report*, NCAA, *supra* note 8, at 60 (discussing infractions cases of the University of Alabama, the University of Arkansas, and the University of Michigan).

only gives credence to their claims of authority within a program but also, and however unintended, serves to reward them for the illicit activities in which they engage.<sup>17</sup>

The NCAA's finding of UM's failure to exhibit institutional control coupled with the constructive notice all collegiate institutions received by the Alabama decision creates a significant presumption that UM officials either knew or should have known of the improprieties taking place within their institution. At the time this Alabama decision was rendered, Nevin Shapiro had only recently begun donating to the UM athletics program, yet over the course of the following decade the institution looked the other way when misconduct was afoot. Unfortunately, the NCAA dropped the ball with the UM infractions investigation and the enforcement of penalties at a time when unnoticed conduct may easily escape punishment, as illustrated by the recent Oklahoma State University findings.

The NCAA's four-year statute of limitations did not bar penalties for UM's violations beginning in 2002 because the limitations do not apply when a pattern of willful violations "began before but continued into the four-year limitation."<sup>18</sup> Recently *Sports Illustrated* conducted a ten-month investigation into the allegations of NCAA violations within the Oklahoma State University's football program over the past decade.<sup>19</sup> The investigation discovered widespread misconduct such as improper cash payments to student-athletes, sham jobs, performance bonuses, academic misconduct, tolerated drug use, and a hostess program consisting of females to entice recruits, where some of the

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<sup>17</sup> *Id.* at 60-61 (quoting the *University of Alabama Public Infractions Report*, NCAA, 1, 3 (February 1, 2002)).

<sup>18</sup> NCAA DIV. I MANUAL § 32.6.3 (2012-13)

<sup>19</sup> George Dohrmann & Thayer Evans, *How You Go from Very Bad to Very Good Very Fast*, SPORTS ILLUSTRATED, Sept. 16, 2013, at 31, 31.

hostesses even had sex with the prospects.<sup>20</sup> Even with these findings, much of the conduct discovered in the *Sports Illustrated* investigation falls outside of the NCAA's statute of limitations.<sup>21</sup> This OSU investigation illustrates how widespread NCAA infractions are today and that the NCAA manpower may be lacking to effectively monitor and uncover most improper conduct. Even if manpower is lacking, the NCAA has the power to instill fear to achieve compliance from the institutions across the country through strict enforcement against the university administrators.

This power was signified in *Bassett*, where the court showed its support of the NCAA's use of harsh penalties such as the show-cause order, but the NCAA has yet to use this sanctioned support to its fullest to protect the integrity of collegiate athletics. As Kobritz and Levine alluded to, the NCAA recently reformed its violation structure into four levels to create a more equitable distribution of penalties. Further reform has been implemented such as expanding the size of the Committee on Infractions,<sup>22</sup> but if history is the best predictor of future action, it is hard to see the NCAA actually employing the breadth of its power in future infractions cases.

Based upon the recent decisions of the Committee on Infractions, the primary deterrent of misconduct going forward rests upon the integrity of coaches and administrators. The NCAA lost a great opportunity in the UM infractions case to effectuate change throughout collegiate athletics by administering show-cause orders for university administrators. Instead the Association preferred to scold UM with its greatest tongue lashing, by telling UM it lacks

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<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.* at 33.

<sup>22</sup> See Emily Potter, *New Reform Efforts Take Hold August 1*, NCAA (Aug. 1, 2013), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/august/new+reform+efforts+take+hold+august+1>.



institutional control. Although it can be easily argued that university officials are unfamiliar with the gray areas in athletics departments and are ill equipped to uncover and confront violations, the time has come where administrators must be scared into policing their respective institutions in order to fully protect student-athletes and the integrity of collegiate athletics. Kobritz and Levine articulate the NCAA's rise in enforcement power thoroughly while advocating a proper solution to reforming the collegiate athletics landscape, but solving the problem requires an understanding of the power used in the most recent NCAA cases. Unfortunately, the power used barely scratches the surface of the Association's enforcement capabilities, leaving little hope for the change that is needed.