

**SUBMARINING DUE PROCESS: HOW THE NCAA USES ITS
RESTITUTION RULE TO DEPRIVE COLLEGE ATHLETES OF THEIR
RIGHT OF ACCESS TO THE COURTS . . . UNTIL *OLIVER v. NCAA***

Richard G. Johnson

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*Richard G. Johnson**

I. INTRODUCTION

Imagine being a trial attorney seeking an injunction for your client. Imagine the opposing side smugly communicating to you throughout the entire lawsuit that the injunction would be in vain, because nobody was going to follow the court's order anyway.

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Attorney and counselor at law, Richard G. Johnson Co., L.P.A., Cleveland, Ohio. B.A. (1986), M.B.A. (1987), J.D. (1990), Case Western Reserve University.

I concentrate my practice on legal ethics and professional responsibility issues, and for the past decade and a half, I have limited my practice to plaintiff's legal malpractice (and ancillary) claims—albeit with some exceptions.

I initially represented Andrew A. Oliver (Andy) in his claims against his former attorneys and the NCAA in *Oliver v. Baratta*, which continued against the NCAA as *Oliver v. NCAA*, and which resulted in the landmark invalidations of the NCAA's bylaws, which were designed to deprive college athletes of the right to counsel, to indirectly regulate attorneys, and to manipulate the judicial systems of the several states.

This Article is dedicated to Andy, one of the nicest young men a person could ever hope to meet—a person who had the character, courage, and perseverance to stand up to the NCAA. And to Andy's father, Dave, a wonderful example of dedicated parenting. Both Andy and Dave have touched my heart and have had a tremendous impact on my life and my viewpoint on practicing law.

I wish to thank Anonymous; Professor Richard T. Karcher; James E. Milliman, Esq.; Sean O'Leary, Esq.; Professor Ellen J. Staurowsky; Scott E. Stewart, Esq.; and Professor Georgene M. Vairo for their helpful and thoughtful comments on earlier drafts of this Article. I also wish to thank the following for their much-appreciated research assistance: Lisa Greer Douglass, M.L.S., Research Coordinator at the NCAA Library & Archives; Sharla B. Johnston, M.L.S., Circulation Services Librarian at the Cleveland Law Library; and Ellen J. Staurowsky, Ed.D., Professor & Graduate Chair of the Department of Sport Management & Media at Ithaca College.

Finally, I wish to thank both the *Florida Coastal Law Review* Staff and Editorial Board.

Now imagine that your client is a star college athlete,¹ that time is of the essence, and that the opposing side is the National Collegiate Athletic Association (NCAA or the Association), whose stated primary purpose is to protect college athletes.² The NCAA was formed for that exact purpose, derives its charitable and tax-exempt status from that purpose, and admits it has a duty to treat college athletes in good faith and to deal fairly with them.³ Yet, the NCAA has a so-called *Restitution Rule* designed to punish colleges and universities, who respect the type of court order you are seeking for your client.⁴

One might be astonished on multiple levels—as was I. I represented Andrew A. Oliver (Andy) in the case of *Oliver v. NCAA*,⁵ and

¹ The NCAA invented the term *student-athlete* as propaganda to counter court findings that college athletes were *employees* and subject to employee rights. See WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995). Mr. Byers was the Executive Director of the NCAA from 1952 to 1988 and essentially built the modern NCAA. See JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 31 (2006) (discussing the Byers years). As an aside, one would expect that Mr. Byers's tell-all book would have had an impact on court cases, but in fact, only one Texas court of appeals case has discussed it. See *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000). Suffice it to say, college athletes should be called what they are—*college athletes*—and academics, attorneys, and judges should stop using the propaganda term henceforth.

For a discussion of this larger college athlete employment issue, please see Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497 (2008), and Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 80-81 (2006). See also Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 573-76 (2009) (discussing and reviewing the college athlete employment issue).

² NCAA, NCAA'S TAX-EXEMPT STATUS, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Commercialism/NCAA+tax+exempt+status> (last visited August 27, 2010).

³ *Id.*

⁴ See *infra* Part III.M.

⁵ I initially represented Andy in his claims against his former attorneys and the NCAA in *Oliver v. Baratta*, No. 2008-CV-0520 (Ohio Com. Pl. June 9, 2008), *on removal*, No. 3:2008cv01734, 2008 WL 3414140 (N.D. Ohio Aug. 8, 2008), *settled & dismissed*, Nov. 26, 2008 (on file with author). This case continued against the NCAA as *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Aug. 15, 2008), *settled & dismissed*, Oct. 8, 2009 (on file with author), with multiple unsuccessful attempts in between by the NCAA to invoke appellate jurisdiction. See *Ohio ex rel. NCAA v.*

Tone, No. E-08-0080 (Ohio Ct. App., *dismissed* Jan. 2, 2009); *Oliver v. NCAA*, No. E-08-0079 (Ohio Ct. App., *dismissed* Jan. 5, 2009); No. E-09-0007 (Ohio Ct. App., *dismissed* Apr. 1, 2009); No. E-09-0029 (Ohio Ct. App., *dismissed* July 15, 2009) (on file with author).

Judge Tygh M. Tone's decision denying the NCAA's first motion to dismiss is reported at *Oliver v. NCAA*, 920 N.E.2d 196 (Ohio Com. Pl. 2008) [hereinafter *Oliver I*]; Judge Tone's decision denying the NCAA's motion for summary judgment is reported at *Oliver v. NCAA*, 920 N.E.2d 190 (Ohio Com. Pl. 2008) [hereinafter *Oliver II*]; and Judge Tone's bench trial judgment granting declaratory and permanent injunctive relief is reported at *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Com. Pl. 2009) [hereinafter *Oliver III*]. Additionally, there were unreported summary judgment entries and transcripts denying the NCAA's second and third motions to dismiss.

For an interesting academic discussion of the initial procedural issues in the case, which highlights why plaintiffs do not like to be in federal court, please see Georgene M. Vairo, *Removal Games*, NAT'L L.J., Sept. 15, 2008, at 15; and Georgene M. Vairo, *The Power of Rule 41*, NAT'L L.J., Aug. 17, 2009, at 20.

For academic discussions of the *Oliver* case and its implications, which were written before the case was over, please see T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175 (2010), as well as Fitt, *supra* note 1, and James Halt, Comment, *Andy Oliver Strikes Out the NCAA's 'No-Agent' Rule for College Baseball*, 19 J. LEGAL ASPECTS SPORT 185 (2009). For a recent discussion written after the conclusion of the case, please see Brandon D. Morgan, Comment, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, But Remains Safe*, 17 SPORTS LAW. J. 303 (2010). For an analysis of the damages methodology developed for the *Oliver* case by my expert witness therein, please see Richard T. Karcher, *Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today's Athletic Potential into Tomorrow's Dollars*, 14 CHAPMAN L. REV. (forthcoming 2010).

The *Oliver* case is now being incorporated into legal research aids, such as *American Law Reports* and *Ohio Jurisprudence*, as well as into law school textbooks. See, e.g., MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & ROBERT C. BERRY, *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 149-50 (2d ed. 2009) (problem 3-4, discussing regulation of intercollegiate athletics).

The *Oliver* case has been reported in thousands of news stories and topical commentary, which are easily available via the Internet. For coverage by the *New York Times*, please see Alan Schwarz with Katie Thomas, *N.C.A.A. Can't Ban Lawyers for Athletes*, N.Y. TIMES, Feb. 13, 2009, at B11; Katie Thomas, *Baseball Star Challenges N.C.A.A. Rule*, N.Y. TIMES, Oct. 4, 2008, at D1; Katie Thomas, *Former Pitcher Receives Settlement From the N.C.A.A.*, N.Y. TIMES, Oct. 9, 2009, at B12; Katie Thomas, *Ohio Court Blocks N.C.A.A. Rule Barring Lawyers*, N.Y. TIMES, Apr. 2, 2009, at B16; Katie Thomas, *Ohio Court Orders N.C.A.A. to Justify Why It's Not in Contempt*, N.Y. TIMES, May 13, 2009; and Katie Thomas, *Uncertainty Reigns After N.C.A.A. Agent Ruling*, N.Y. TIMES, Apr. 5, 2009, at SP4; Pat Borzi, *Settlement Sheds Little Light on N.C.A.A. No-Agent Rule*, N.Y. TIMES, July 24, 2010, at D-1 (with Katie Thomas contributing).

when I was faced with this predicament, I amended the motion for a preliminary injunction as well as the complaint to seek a declaratory judgment and permanent injunction invalidating the NCAA's Restitution Rule, which now reads as follows:

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

- (a) Require that individual records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
- (b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
- (c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
- (d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
- (e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
- (f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;

- (g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;
- (h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and
- (i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.⁶

Following a bench trial on our declaratory and injunctive claims in January 2008,⁷ which included some seventeen or so witnesses and numerous exhibits over more than a week, Judge Tygh M. Tone of the Erie County, Ohio, Court of Common Pleas invalidated the NCAA's Restitution Rule, as follows:

[T]he court now addresses the issue of whether Bylaw 19.7 is arbitrary and capricious.

. . . .

The plaintiff would ask: "How could any entity punish an individual for accessing their right to Court?" The defendant argues that the member institutions agreed that it was improper to allow an institution to reap the bene-

⁶ NCAA PUBLICATIONS, NCAA 2009-2010 DIVISION I MANUAL 296 (2009) [hereinafter *Div. I Manual*], available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx> (setting forth Bylaw 19.7).

⁷ These claims were bifurcated from our damage claims for breach of contract and tortious interference with contract to be tried to a jury in October 2009.

fits of playing a student-athlete who was finally adjudicated to be ineligible. Just because member institutions agree to a rule or bylaw does not mean that the bylaw is sacrosanct or that it is not arbitrary or capricious.

Throughout the history of this country many institutions and entities have agreed to bylaws that were against the notion of a fair judicial process. The regulations must be fair to the people to whom they were meant to serve, especially when it comes to the right of an individual to petition the court system. Courts of appeal have never been without remedies for cases that they overturn as it relates to the parties that are involved. Student-athletes must have their opportunity to access the court system without fear of punitive actions against themselves or the institutions and teams of which they belong. The old adage, that you can put lipstick on a pig, but it is still a pig, is quite relevant here. The defendant may title Bylaw 19.7 "Restitution," but it is still punitive in its achievement, and it fosters a direct attack on the constitutional right of access to courts.

Bylaw 19.7 takes the rule of law as governed by the courts of this nation and gives it to an unincorporated business association. The bylaw is overreaching. For example, if a court grants a restraining order that permits a student-athlete the right to play, the institution will find itself in a real dilemma. Does the institution allow the student-athlete to play as directed by the court's ruling and, in so doing, face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of Bylaw 19.7, decide that it is safer to disregard the court order and not allow the student-athlete to play, thereby finding itself in contempt of court? Such a bylaw is governed by no fixed standard except that which is self-serving for the defendant. To that extent, it is arbitrary and indeed a violation of the covenant of good faith

and fair dealing implicit in its contract with the plaintiff, as the third-party beneficiary.⁸

Even a facial review of the NCAA's Restitution Rule reveals that it is anything but restitutionary. The Rule mirrors other penalty rules,⁹ and actually includes the word *penalty*¹⁰ when penalties have nothing to do with the concept of restitution. The concept of punishing innocent third parties is about as far away from the equity of restitution as one can get.¹¹

⁸ *Oliver III*, *supra* note 5, ¶¶ 44-46.

⁹ Compare DIV. I MANUAL, *supra* note 6 at 292-95 (setting forth Bylaw 19.5, which allows financial penalties, probations, and vacating or striking individual and team records) with *id.* at 296 (setting forth Bylaw 19.7, which allows financial penalties, determinations that teams are ineligible for postseason and championship meets, and vacating or striking individual and team records).

For a discussion of restitution in the context of criminal sentencing, see CHARLES ALAN WRIGHT, NANCY J. KING, SUSAN R. KLEIN & SARAH N. WELLING, 3 FEDERAL PRACTICE AND PROCEDURE CRIM. § 528.2 (3d ed. 2003 & Supp. 2010); see also MODEL PENAL CODE § 301.1(2)(h) (1962) ("The [c]ourt, as a condition of its order [suspending the sentence or imposing probation], may require the defendant . . . to make restitution of the fruits of his crime or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby"); MODEL PENAL CODE: SENTENCING § 1.02(2) cmt. b, reporter's note b (Tentative Draft No. 1, 2007) (discussing principles of sentencing regarding the advancement of utilitarian purposes via restitution).

¹⁰ DIV. I MANUAL, *supra* note 6 (Bylaw 19.7(i)).

¹¹ See *id.* A preliminary injunction maintains the status quo during a case and a permanent injunction does so thereafter, whereas the legal doctrine of restitution is concerned with the remedy against a person unjustly enriched via the receipt of money or identifiable property rights. See RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937) (discussing concept of restitution for unjust enrichment); see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (Tentative Draft No. 7, 2010). Therefore, not only does the predicate not exist to apply this legal doctrine, even if the predicate did exist, restitution is not allowed in situations that would violate public policy, such as trying to obstruct one's access to the courts. RESTATEMENT (FIRST) OF RESTITUTION § 62 (1937). Even more hypocritically, the NCAA has denied in numerous cases, including *Oliver*, that student-athletes have identifiable interests or protected property rights in playing intercollegiate athletics. See Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1153 (1987). Yet, the NCAA has championed the Uniform Athlete Agent Act, which gives its members causes of action for money damages against agents, who damage their

Moreover, the Rule provides no *restitution* when a college athlete's eligibility is found to have been improvidently revoked, so it is completely one-sided.¹² However, this last point may be the result of the NCAA's *presumable* zero error rate in prosecutions, and the fact the NCAA has never found any college athlete to have been improperly suspended—to my knowledge. Incredibly, the NCAA does not even have a mechanism or procedure to find improper suspensions.¹³ Ostensibly, a zero error rate is statistically impossible in prosecutions, which tells everything about the alleged fairness of the NCAA's system—as the system can never be wrong.

So why does a rule like this even exist, and why is it called *restitution* when, more appropriately, it might be called the *it's our way or the highway* rule?

members by damaging student-athletes' NCAA eligibility. UNIF. ATHLETE AGENTS ACT § 16, 7 U.L.A. 22 (2000) (creating civil remedy for violation of the Act).

Specifically:

In 1997, the NCAA and several major academic institutions urged the National Conference of Commissioners on Uniform State Laws (NCCUSL) to consider drafting a model law that would provide a uniform system for regulating athlete agents. NCCUSL is a national organization that drafts uniform and model state laws and comprises more than 300 lawyers, judges, state legislators and law professors appointed by their respective states. After agreeing to tackle this important project, NCCUSL convened an 11-person drafting committee that conducted drafting sessions over a three-year period. All interested parties were welcome to attend and included representatives from the NCAA, staff from the professional league players associations, athlete agents and other interested parties. In the fall of 2000, NCCUSL completed its work on the Uniform Athlete Agents Act (UAAA).

Currently the UAAA has been passed in 40 states, the District of Columbia and the U.S. Virgin Islands One state has active UAAA legislation in its legislative chambers Three states have existing, non-UAAA laws designed to regulate athlete agents Seven states and one territory have no existing law regulating athlete agents

Uniform Athlete Agents Act (UAAA) History and Status, NCAA, http://www.ncaa.org/wps/myportal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Legislation+and+Governance/Eligibility+and+Recruiting/Agents+and+Amateurism/Uaaa/history.html (last visited Oct. 23, 2010) (password required) (on file with author).

¹² See DIV. I MANUAL, *supra* note 6.

¹³ See generally *id.*

The answer is chilling. In the early 1970s, the NCAA was advised by its outside counsel to adopt due process procedures for college athletes, yet the NCAA did not heed such advice. To deal with the onslaught of lawsuits, it attempted to adopt exhaustion of administrative remedies and fee shifting rules, but failed to do so, and the NCAA then *submarined* the internal advice regarding due process until it was unearthed in the Walter Byers Archives at the NCAA Library in the spring of 2010.¹⁴

Simply put, had this advice been given to the NCAA's members in 1973 and disclosed to the courts in every lawsuit thereafter, the past four decades of due process litigation by college athletes against the NCAA would not have occurred or would have occurred with far less frequency. This change would have been the result of due process procedures being implemented by the colleges and universities thereby providing an appropriate forum for college athletes. Instead, the world has witnessed four decades of college athlete lawsuits against the NCAA, because the athletes have no other forum in which to vent their grievances, as the NCAA and its members provide them none.¹⁵

This Article will explain the historical context in which the Restitution Rule came to be as well as the legislative history of the Rule and its interplay with due process.¹⁶ It examines how the Restitution Rule and its state high school athletic association analogs have fared in the courts, in Congress, and with commentators.¹⁷ This Article explains how the Restitution Rule has been used to torpedo college athletes' right to a pre-suspension hearing,¹⁸ and then it presents the damning

¹⁴ My colleague, Ellen J. Staurowsky, Ed.D., Professor & Graduate Chair of the Department of Sport Management & Media at Ithaca College, was kind enough to travel to the NCAA Library & Archives in Indianapolis, Indiana to conduct old-style, manual research. For two days, she scoured the Walter Byers Archives and other resources looking for the needle in the haystack, and without her diligence and hard work, this evidence would not now be known outside of the NCAA.

¹⁵ See, e.g., Richard G. Johnson, Op-Ed., *Slaves on the NCAA's Plantation?: No Due Process for 360,000 Student-Athletes*, LEXINGTON HERALD-LEADER, Mar. 1, 2010, at A9. This title was chosen by the newspaper without my knowledge or consent, but it is an apt title save for the student-athlete designation.

¹⁶ See *infra* Part III.

¹⁷ See *infra* Parts IV-VII.

¹⁸ See *infra* Part VIII.

evidence from the *Oliver* case that prompted the declaratory judgment invalidating this Rule.¹⁹ This Article overviews the defenses and themes the NCAA throws as obstacles to court challenges by college athletes, and concludes with the observation that Congress should legislate amateur sports via an independent agency and administrative court system, while stripping the NCAA of its assumed ability to regulate nonmembers—i.e., the college athletes, who number anywhere between 350,000 to 400,000 in any given year.²⁰

This is not a typical law review article, because it is intended to perform a number of purposes: this Article is a first-person narrative, a legislative history, a practice guide, as well as a typical legal analysis of the topic. As such, it is not short, and intentionally so, because I aim to be comprehensive.

II. SUBMARINING DUE PROCESS

By a memorandum, dated July 30, 1973, from the Executive Director of the NCAA, Walter Byers, to the NCAA Council on the issue of due process, he stated:

The Council, at its meeting of October 23-25, 1972 (Minute 5-i), directed our office to distribute to the membership “materials concerning due process procedures involved in disciplinary matters or eligibility of student-athletes.”

This assignment has not been completed primarily because of the differing views of the courts on this issue and differences of opinion among our legal advisors.

Recent court cases, however, have heightened the problem for member institutions and the NCAA. Consequently, I requested a position statement by our general counsel.

Enclosed please find Mr. Gangwere’s July 10 letter setting forth his recommendation. I also am forwarding a copy of a backup memorandum prepared by a member of his firm.

¹⁹ See *infra* Part IX.

²⁰ See *infra* Parts X-XI.

Before advising the membership, it would be helpful if we could obtain the advice and direction of the Council, both as to our own procedures [i.e., Subcommittee on Appeals (individual eligibility) and Committee on Infractions (institutional discipline)] and the procedures we recommend member institutions follow.

This is scheduled for discussion at Chicago later this week.²¹

The accompanying letter, dated July 10, 1973, from the NCAA's outside General Counsel, George H. Gangwere, Esq., to Mr. Byers stated:

I enclose a memorandum relating to due process of law as applied to individual eligibility. This memo will show you: (1) that even though there may be no constitutional right to participate in intercollegiate athletics there may be a sufficient interest in such participation to require the observance of due process before one can be deprived of it and (2) that the courts have not been consistent in deciding whether or not participation in intercollegiate athletics is such a substantial interest that it requires due process protection. Certainly where the eligibility of potential professional athletes or "super stars", or the continuation of a grant in aid, are involved it would not be difficult for a court to find such a substantial interest. We also know that in the *Behagen* case and in the *Fiske University* case (a Tennessee state court action in which the NCAA was a party) the court talked of "fundamental fairness" and required notice and a hearing for the athletes.

It is our recommendation, therefore, that the member institutions be urged to give notice and an opportunity for a hearing to student athletes in any infrac-

²¹ Memorandum from Walter Byers, Exec. Dir., NCAA, to the Members of the NCAA Council (July 30, 1973) (on file with the NCAA Library's Walter Byers Archives).

tions action wherein it is proposed to suspend eligibility or aid.²²

The attached research memorandum regarding procedural due process surveyed the state of the law at the time and advised as follows:

Therefore, it is the conclusion of this author, that if the action is taken directly by the university or college that said university or college, must afford the athlete a hearing. If the NCAA acts *directly* against either an athlete or a university or college it also should comply with the requirements of procedural due process. In the future, the courts will not allow superficial attempts to sidestep the due process requirements to stand in their way. In other words, if it is the NCAA that has ruled that an athlete is not qualified to participate in a given sport then, regardless of who finally informs the athlete of this fact, the NCAA shall probably be required to grant a hearing in accordance with the requirements of the 14th [A]mendment.

. . . .

It is recommended that the member schools be informed of the “minimum standards” for a hearing under the due process requirements and that the NCAA either refrain from direct action or that it, also, afford the athlete or college a hearing.

Final Note:

Since the Commissioner is given a general grant of authority to promote the welfare of the Association, it is consistent with this opinion that he have the authority to temporarily suspend players, or universities or colleges pending the hearing, “if in his view a suspension is necessary to protect the interests of the [Association].”

²² Letter from George H. Gangwere, Attorney, Law Offices of Swanson, Midgley, Eager, Gangwere & Thurlo, to Walter Byers, Exec. Dir., NCAA (July 10, 1973) (on file with the NCAA Library’s Walter Byers Archives) (emphasis omitted).

Such a preventive suspension should not violate due process unless it is imposed “arbitrarily” or “capriciously,” or is in fact “punitive.” *Behagen*, supra.²³

There is no evidence that either the NCAA or Mr. Gangwere, both of whom owed fiduciary duties to all of the NCAA members, including the duty to give them this specific advice directly, ever communicated this specific information to the NCAA membership.

However, this issue must have been percolating through the NCAA membership, because, by a letter dated November 8, 1974, the President of California State University at Long Beach, Stephen Horn, sent nine proposed amendments to the NCAA’s Secretary-Treasurer, Richard P. Koenig, vice president for public and alumni affairs at Valparaiso University, for consideration at the NCAA’s 1975 Convention to be held that January, which included two due process proposals.²⁴

At the 1975 Convention’s General Round Table discussion, Mr. Koenig presided over the following panel discussion, which is presented in its entirety in regards to litigation, because it illustrates the real reason why the Restitution Rule was adopted, which is far different than its stated purpose:

CHAIRMAN KOENIG: Thank you, Dave, for a job well done. I assure you that it is mere coincidence that we move from a discussion on women to a discussion on litigation and enforcement. It is my pleasure to present to you the three panelists. I will let them move ahead on their own.

Boyd McWhorter will report on the Special Committee on Enforcement. Boyd is the commissioner of the Southeast Conference. He is a past member of the Council, and, as I said, a member of the Special Committee on Enforcement. He will be followed by Ed Sherman, di-

²³ *Id.*, attached memorandum, at 5-7.

²⁴ Letter from Stephen Horn, President, Cal. State Univ., Long Beach, to Richard P. Koenig, Secretary-Treasurer, NCAA, attached proposal, at 1, 8 (Nov. 8, 1974) (on file with the NCAA Library’s Walter Byers Archives).

rector of athletics at Muskingum College, a member of the Executive Committee, a member of the Special Committee on Enforcement and chairman of the Committee on Reorganization. Ed will be followed by Phil Brown, who has been introduced to you previously [NCAA Legal Counsel].

. . . .

. . . I [Boyd McWhorter] present to you now Ed Sherman who will talk to you on litigation.

EDGAR SHERMAN (Muskingum College): During the past three calendar years, there have been 25 suits of one kind or another filed against the Association. The NCAA's position has been sustained in almost all instances. This would seem to me that legally we have adopted a good set of regulations to guide us in the conduct of our sports. The cost of this litigation has been nearly \$500,000. That is the legal cost. As you can note, in 1971, there were two cases against us; and it has grown to 25 just in a short three years. You can figure that out to be over 1,000 per cent, which is astronomical. Most people thought that after we had won a few of these cases and some legal precedent had been developed in the sports law, the legal traffic would be reduced. This doesn't seem to be true.

This probably is because of the fact the plaintiffs have often gained some benefits in the process without any substantial costs. Some of the benefits have been temporary eligibility and publicity in their own area. On the other hand, we have gained nothing as an organization, except usually to have our positions sustained; and our costs are substantial as we fight these actions in all parts of the country.

We also gain an awful lot of bad publicity which certainly is not good for the organization. Our rules are sustained time and time again, but these become hollow

victories when faced with the bleak prospect that the NCAA may well not be able to defend against so many actions in so many locales. The multiple defense costs have to be born by us while these institutions just have to bear their own costs.

Our legal counsel has advised us if this isn't stopped pretty quickly, we may have to go out of business. You must remember this is a voluntary organization. No one has to belong. The rules and regulations have to be adopted by the membership, with the obvious intent that the membership will observe it. Each member institution is the agency which must apply the rule for the eligibility of the student-athlete, not the NCAA, which too often is thought of as a big monster in Kansas City.

Finally, upon appeal by the member institution on behalf of the student-athlete, the NCAA Council or a sub-committee acting for it may restore this eligibility. In other words, there are methods of appeal. We should exhaust all of them before we take legal action. I would like to call your attention to the fact that with this cost of over \$400,000 that we are spending is deducted from the funding of other services which could be provided to the membership. In almost all cases, our rules have been determined to be both sound and right. The cost of fighting a preliminary injunction must be eliminated, or certainly must be diminished.

You have heard this morning in the report that our Reserve Fund had gone from a balance of \$122,000 to a deficit of \$300,000. What is the solution? Probably Proposals No. 62 [Obligations of Membership—Legal Costs] and No. 63 [Restitution] would be the solutions that our legal counsel has advised.

No. 62 [Obligations of Membership—Legal Costs] says that an institution must exhaust all procedures for appeal, must cooperate and must not encourage

others to bring actions. If it takes legal action before taking these steps, it probably will be asked to help pay for the court costs.

No. 63 [Restitution] simply states that if an ineligible athlete is permitted to participate during a court restraining order and the injunction is later vacated, the Council may take optional actions—there are several listed—in the interest of restitution and fairness. These proposals would help to discourage legal actions against the NCAA in several ways.

If this is approved by a majority of the members, it would indicate that a member who sponsors litigation against the Association will likely incur the disfavor of the majority of other members, and possibly the monetary penalty should be a deterrent from premature litigation. You should note the proposal is limited in its application of the lawsuits filed before the available procedures are taken within the Association.

Now, I will turn the podium over to Mr. Phil Brown.

MR. BROWN: I can't tell you how many times in recent years I have made the remarks to Walter Byers this organization seems to have more legal problems than General Motors.

You all saw the chart that was in the NCAA NEWS in August, which was entitled *Court Actions Keep NCAA Attorneys on Their Toes*, and the summary of prompt legal opinions involving the NCAA during 1973-74. Now, that was a good chart. For the layman, it gives a very good summary of the legal issues involved in the 19 cases that are listed on that tabulation as of August, 1974.

We prepared a recent list in our office, and there are five more significant cases that are in the courts since

the August chart was prepared. This underscores Ed's points that the problem seems to be increasing rather than diminishing. To some extent, certain kinds of cases may be inevitable or standard. There may be certain kinds of injury cases or certain disputes between the NCAA and professional interests which, from time to time, will involve litigation. But there has been a real rash of cases involving requests for one form or another of injunctive relief, either initial temporary restraining orders or preliminary injunctions, which involves, first, what may be an ex-parte hearing, a hearing simply by a judge where the plaintiff and his lawyer are present only, requesting a temporary restraining order on the basis of the facts and arguments set forth in the complaint.

That is before there has been an opportunity for the defendant to become involved. Sometimes these orders are granted, and at a later date, when there has been an opportunity for a full hearing on the *motion*, for a permanent or temporary injunction, the order is vacated because the case has been found to be without merit. There have been a number of these cases that have come up under the 1.6 rule, and one or more recently under the 2.000 rule. Some of them come up under the extra event rules; and some have come up under the rules of professionalism, including one involving the marketing agent.

Some of the cases come up involving foreign hockey players and one case here, the Howard case, involved a foreign student rule. As Ed says, in virtually every one of these cases, after an expenditure of a very substantial amount of time and money, because these cases involved very substantial legal hours, whether they are one lawyer or another, it is the same problem across the nation; and it has added immensely to the cost that the Association has had to pay.

While there may be a single adage in the halls of the courtroom, *Love me, sue my client*, I, nevertheless,

echo the sentiments Ed has expressed that the best course of action for this Association to follow is one which can hope to lessen and hopefully significantly reduce the number of legal actions that are brought involving institutions belonging to the Association or athletes of those institutions, by challenging and testing the rules of the Association prior to the completion of the administrative remedies provided within those various rules.

I don't know whether it serves any great purpose to give you any details of the particular cases. I think perhaps I should give you two or three trends. To some extent, this line of cases has been developing, can best be called the NCAA body of law. This is a dubious distinction for the NCAA to achieve; but, nevertheless, it has achieved it, and in several very significant areas. Some of these challenges have involved constitutional allegations. Some are charges that the NCAA deprived an individual of his rights under the Fifth and Fourth Amendments of the Constitution. Some of these challenges have asserted that the rules were improper use of monopoly power and violations of antitrust laws. Some of the cases have asserted that the effect of the rule as applied to an individual athlete is tortuous [sic], a wrong in the sense that he has been deprived of his right of a prospective advantage. Some of them involve just damages for other kinds of alleged negligence. One involved an agency placing students in colleges on the basis of their athletic ability. As these cases have evolved, in virtually all of them after there has been enough time for a careful hearing or a trial *de novo* or an appeal at the appellate level, the NCAA has successfully defended itself against these challenges.

In many of the opinions, the judges have given what I consider to be remarkably unusual and ringing statements in support of the NCAA rules. Judges did not always express enthusiasm for whatever way in which they are deciding the case, but many of these opinions

would actually warm your heart to see the judge recognizes the vital importance of these rules to the educational objectives they are intended to serve.

The one rule that has been declared illegal is the foreign athlete rule in the Howard case on the basis that it was a discrimination against aliens by a separate category. The judge, even in holding that rule illegal and unconstitutional, said he was sympathetic with the problems faced by the organization but he felt there were other ways in which the same objective could be achieved without having an unconstitutional discrimination against the aliens per se.

In all the other situations, as I say, the NCAA has managed, after it has spent enough time and money, to come through with significant and ringing victories. I would hope the membership would give very serious consideration to Proposals No. 62 [Obligations of Membership—Legal Costs] and No. 63 [Restitution]. These have had the input of the NCAA general counsel in Kansas City, of ours and other lawyers, the members of the Council and of the NCAA administration. They are carefully worded to recognize constitutional rights of individuals and rights to sue, but to attempt to limit in proper ways suits that are not necessary, if members wish to support their own rules.

Accordingly, I echo the request that the chairman has made.

DELEGATE: No. 62 [Obligations of Membership—Legal Costs] is a very sound rule, but I have some serious questions about No. 63 [Restitution]. It deals with the activity of the institution, and it assesses the penalty when the institution brings the action itself or directly or indirectly encourages or induces another to bring it, or fails to cooperate fully in the defense of the action. In No. 63 [Restitution], the institution may be subjected to a penalty for an action taken by the student

without its consent or cooperation. If a student is declared ineligible by the institution, the student goes out and gets the injunction. The school is powerless to avoid the injunction. They may defend it to the best of their ability, and the NCAA may come in and defend it with them; but if the court finds the injunction should issue, the school must play. To penalize the institution because the injunction is subsequently vacated, to take money from them seems to be unfair.

MR. BROWN: My understanding on the part of those who drafted this rule, is that the intended objective is phrased in discretionary terms in order to give the NCAA Council the authority, if needed, to apply differing results in different circumstances. The basic point is that if the student is alleging a violation of his constitutional rights which is not a violation of his right and which is later determined not to be, and if the purpose of that allegation is in order to participate in a particular event in which he would not participate if he were not making this unfounded allegation, the Council can take appropriate remedial action thereafter.

Whether an institution has exercised all its obligations, to the best of its ability, is something that can vary from case to case. We have had litigation in which coaches have testified that they encouraged an individual student-athlete to compete in unsanctioned meets. I think there is at least a question if, when an individual who acknowledges under oath he is taking that kind of action, is doing all he can to uphold the rules of the institution or whether, on the other hand, he is helping to create the violation.

DELEGATE: I think that is well taken. I think it should be in No. 63 [Restitution]. I think that it should state in there if the institution does not fully cooperate, the NCAA may take one or more of these measures; but it doesn't say that. It simply says if the student-athlete

obtains the restraining order, and it is subsequently vacated, in any case, under the wording here, the NCAA may invoke the penalty. It would seem a small amendment that if the institution encourages this or induces the boy to bring the suit or failed to cooperate, then they may do these things. I think we should be more consistent.

MR. BROWN: I appreciate your points. I simply will observe the Council has discretion, and the facts vary significantly from one case to another and some of the remedial steps are proposed in order to be fair to other institutions.

CHAIRMAN KOENIG: If you have other questions on this matter, I would urge you to bring them up to the other members of the Council or at your Division Round Tables tomorrow. . . .²⁵

So the purpose of the two proposals, Obligations of Membership—Legal Costs, which was defeated, and Restitution, which was adopted, was to put a stop to the lawsuits then inundating the NCAA. The former curtailed members' rights, so it was defeated, and the latter curtailed college athletes' rights, so it was adopted,²⁶ which is a reminder of why democracy is important and what happens in nondemocratic systems.

This historical snapshot is also important because this is how and when, like SkyNet in the *Terminator* movies,²⁷ the NCAA became self-aware as an organization that could systemically strike back against the legal system.

²⁵ NCAA, *Proceedings of the 69th Annual Convention of the NCAA* 63, 65-69 (General Round Table, Jan. 6, 1975) [hereinafter *NCAA Proceedings I*] (emphasis in original).

²⁶ See *infra* Part III.

²⁷ See *THE TERMINATOR* (Orion Pictures Corp. 1984); *TERMINATOR 2: JUDGMENT DAY* (TriStar Pictures 1991); *TERMINATOR 3: RISE OF THE MACHINES* (Warner Bros. Pictures 2003); *TERMINATOR SALVATION* (Warner Bros. Pictures 2009).

III. HISTORY OF THE RESTITUTION RULE

Researching NCAA history, policies, procedures, and rules is an arduous task. It essentially requires manual research of materials which are generally not readily available online or indexed in most libraries. The process is tantamount to legal archeology. Therefore, it is important to know how the Restitution Rule was denominated at different points in time.

The numbering of the Restitution Rule has changed over time, as follows:

- In 1975, the NCAA adopted the Restitution Rule as Section 10 of its Official Procedures Governing the NCAA Enforcement Program that were part of its annual Manual;²⁸
- In 1989, the NCAA completely overhauled the format of its Manual, and in the process, the Restitution Rule became By-law 19.6;²⁹
- In 1993, the NCAA renumbered the Restitution Rule as By-law 19.7;³⁰
- In 1994, the NCAA renumbered the Restitution Rule as By-law 19.8;³¹
- In 1997, the NCAA restructured itself, and part of that restructuring included issuing separate Manuals for its three divisions; however, the Restitution Rule remained applicable to all of these divisions, and its numbering remained consistent across all three Manuals, even though the Manuals differed to some degree on other rules;³² and

²⁸ *NCAA Proceedings I, supra* note 25, at 150, A-33 to A-34 (Business Session, Jan. 8, 1975); *see also* 1975–1976 MANUAL OF THE NCAA 117 (1975).

²⁹ NCAA, *1989 NCAA Convention Proceedings*, 304-05, A-68 to A-69 (General Business Session, Jan. 11, 1989); *see also* 1989-90 NCAA MANUAL 272.

³⁰ 1993-94 NCAA MANUAL 322.

³¹ 1994-95 NCAA MANUAL 345.

³² 1997-98 NCAA DIVISION I MANUAL 329 (applying to all three divisions).

- In 2003, the NCAA renumbered the Restitution Rule back to Bylaw 19.7,³³ where it currently remains.³⁴

A. *NCAA's Adoption of the Restitution Rule in 1975*

In January 1975 at the NCAA's Sixty-ninth Annual Convention, David Swank, a professor of law at the University of Oklahoma, a former member of the NCAA's Council as well as a former NCAA vice president, and a then new member of its Executive Committee, made the following proposal to adopt the Restitution Rule (Proposal 63):

I am sure glad the Council assigns me all the easy ones. [Laughter] Mr. President, I move the adoption of Item No. 63 [Restitution Rule].

[The motion was seconded.]

This amendment to the Enforcement Procedure would enable the Council to take one of several specific actions against a member institution which gained something improperly.

What this amendment seems to do is require that there be fairness to the other institutions. We have talked a great deal about fairness in certain performers. If an institution uses an ineligible athlete, then the Council could take certain action.

I would point out that this is not a *shall* but a *may* situation. Obviously, it would depend upon the type of ability, I suppose, that the individual performer had. I am sure that in some instances there would be very little contribution by that individual for the overall performance of the team or the group. If there is, then of course, they could take this action. I would urge its adoption.³⁵

³³ 2003-04 NCAA DIVISION I MANUAL 340-41.

³⁴ DIV. I MANUAL, *supra* note 6.

³⁵ NCAA *Proceedings I*, *supra* note 25, at 150 (Business Session, Jan. 8, 1975) (emphasis in original).

The Proposal read as follows:

ENFORCEMENT PROCEDURE: Amend the Enforcement Procedure by adding a new Section 10, page 110, and renumbering the subsequent Section, as follows:

“Section 10. If a student-athlete who is ineligible under the terms of the Constitution, Bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or the Association, or both, and said injunction is subsequently voluntarily vacated or finally determined to have been improvidently issued, the Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions:

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

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

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

“(d) Determination of ineligibility for one or more National Collegiate Championship events in the sports and in the seasons in which such ineligible student-athlete participated;

“(e) Determination of ineligibility for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;

“(f) Requirement that the institution shall remit to the NCAA the institution’s share of television receipts for appearing in any national or regional telecast under the

NCAA Football Television Plan where the Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast. Any such funds thus remitted shall be devoted to the NCAA Postgraduate Scholarship Program.

“(g) Requirement that the institution which has been represented in an NCAA championship event by such a student-athlete shall return its share of the net receipts from such competition in excess of the regular expense reimbursement; or if said funds have not been distributed, requirement that they be withheld by the NCAA executive director.”³⁶

The source for the Proposal was the NCAA Council,³⁷ and the stated intent was:

To enable the NCAA Council to take one or more of the specified actions against a member institution by way of restitution, rather than as a penalty, based on the legal principle that a party who obtains benefit from an improperly issued injunction has a duty to restore that benefit to those who have been injured by the injunction.³⁸

The Proposal was approved by a voice vote, and it was effective immediately.³⁹ As shown by the floor debate, the stated intent belies the true intent, which was to effectively neuter any court injunctive orders issued against the NCAA or its members in the future.

B. NCAA's Submarining of Due Process in 1975

The adoption of the Restitution Rule did not occur in a vacuum but was part-and-parcel of the due process litigation quagmire that was then consuming the NCAA. At the same Convention, Jack Sawyer, a professor of computer science at Wake Forest University, and later one

³⁶ *Id.* at A-33 to A-34 (emphasis omitted).

³⁷ *Id.* at A-34.

³⁸ *Id.*

³⁹ *Id.*

of the NCAA's vice presidents as well as a future member of its Committee on Infractions, made the following proposal to adopt the Penalty Structure Rule (Proposal 64):

At the request of the Council, I move the adoption of No. 64 [Penalty Structure Rule].

[The motion was seconded.]

This is one of those extremely, legal technicalities, which probably will be better presented by a lawyer. The idea here is, as you know, the NCAA is an organization of institutions rather than individuals. We have run into some difficulty legally in saying that we can enforce specific actions directly from the Infractions Committee to a student without any violation by the institution.

For example, a student is declared eligible by an institution. His eligibility would have to be taken away by his institution and not by the Infractions Committee. This will have no effect on the infractions procedure, but it will simply keep us from getting in legal difficulties.⁴⁰

The Proposal read as follows:

ENFORCEMENT PROCEDURE: Amend Section 7-(a)-(12), pages 107-108, as follows:

“(12) Requirement that a member institution which has been found in violation show cause why:

“(i) a penalty or an additional penalty should not be imposed if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against athletic department personnel involved in the infractions case, any other institutional employee if the circumstances warrant, *the student-athlete involved* or representatives of the institution's athletic interests; or

“(ii) a recommendation should not be made to the membership that the institution's membership in the Associa-

⁴⁰ *Id.* at 150.

tion be suspended or terminated if, in the opinion of the Committee (or Council), it does not take appropriate disciplinary or corrective action against the head coach of the sport involved, any other institutional employee if the circumstances warrant, *the student-athlete involved* or representatives of the institution's athletic interests.

“‘Appropriate disciplinary or corrective action’ may include, for example, termination of the coaching contract of the head coach and any assistants involved; suspension or termination of the employment status of any other institutional employee who may be involved; *declaration of ineligibility for any student-athlete involved for a specific period*;⁴¹”

The source for the Proposal was the NCAA Council,⁴² and the stated intent was “[t]o eliminate references to disciplinary or corrective actions against student-athletes.”⁴³ The Proposal was approved by a voice vote, and it was effective immediately.⁴⁴ By the stroke of a pen, the NCAA enacted the charade that, since it does not directly punish college athletes, it does not have to afford them any due process whatsoever.⁴⁵ Mr. Horn then made the following proposal to adopt the Obligations of Membership Rule (Proposal 68):

I move the adoption of Proposal No. 68 [Obligations of Membership Rule].

⁴¹ *Id.* at A-35 (emphasis in original).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See, e.g., Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747 (1992).

The NCAA contends that since it is not taking any direct action against the student, it is not required to provide that student with due process before deciding that he is ineligible. Not surprisingly, many commentators have not been impressed with the NCAA's claim that it is not in fact making decisions about the eligibility of student-athletes, and the procedures surrounding the declaration of ineligibility and restoration of eligibility have been cited as examples of the lack of due process provided by the Association.

Id. at 799 (footnote omitted).

[The motion was seconded.]

This amendment is offered because especially in the public institutions—but even increasingly in the private institutions—courts, state laws, boards of trustees and academic university centers have insisted on some known procedure of due process in the case of the infractions by students, be they student academic or athletic affairs, or any other aspect of the university.

This proposed language would state that if a student-athlete were ineligible under our Constitution, By-laws or other legislation, prior to the ax falling on that student-athlete—who might later be found to be innocent either by the NCAA Committee on Eligibility or the courts—the student-athlete, just as any other human being in our Anglo-Saxon judicial oriented society, would have to receive notice and have an opportunity for a hearing with respect to his ineligibility.

In order to keep an institution from fudging on this, we wrote in a 30-day limitation for a due process hearing. If a student-athlete is accused of something and the institution immediately rules him ineligible and it takes time for the NCAA hearing apparatus, you have students running off to the courts to get a temporary restraining order. This is to make sure that the student-athlete gets a hearing and not be deprived of a fourth of his amateurism life and in no case could that decision take more than 30 days.

WILLIAM MATTHEWS (University of Kentucky):
Despite the lateness of the hour and despite the obvious support that President Horn has generated for his thoughtful proposal, as I read that and understand this proposed amendment, it seems to suggest that there is some relationship in due process between the NCAA and the student-athlete. O.I. 20 does not speak to the loss of ineligibility through infractions by the institution. This is the basic O.I. that places on the institution the obliga-

tion to determine eligibility without ever coming to the Infractions Committee or coming through that process.

There is a legal gap, perhaps, whether eligibility is a status or whether loss of natural ability is a sanction. Now, my basic concern and what I draw to the attention of all the delegates here, is that opposing this amendment will not reduce one iota the institutional obligation to provide full and due process to the student, because the student's relationship runs to the institution.

Admittedly, the proposed amendment has some kind of 30-day savings. Taking into account this is the O.I. that results in self-executing determination of eligibility out of the institution, I feel that this amounts to a 30-day delay in all institutionally determined eligibility matters. I don't believe in using lightly phrases before this big of a group. But this sounds like a 30-day ineligibility entitlement to play. I think that runs against the whole thrust of the carefully conceived existing legislation, based very carefully, as President Horn recognized this morning in some of his other proposals, on the maintenance of a separation of relationships insofar as the NCAA's running its relationships even at the due process directly to the student.

I would urge this proposal not be adopted.

MR. HORN: If Proposal No. 68 is not adopted, is Proposal No. 69 to amend the Enforcement Procedures still in order, or does it need the Constitutional sanction? These are similar proposals to get at the same problem.

PRESIDENT CHAPMAN: They are similar, but I don't believe No. 69 depends upon No. 68.

MR. HORN: I think No. 69 might more clearly meet your objection.

MR. MATTHEWS: No, I have the same objection to No. 69 when we get to it.

MR. HORN: It says where a penalty is to be imposed on a student-athlete or staff member, it implies the action of the Committee on Infractions. We are not talking, in either No. 68 or No. 69, about an institution in the normal course of it determining eligibility getting an extra 30 days. What we are talking about is when the NCAA makes certain findings in a long list of allegations. The student-athlete deserves the right to notice, to due process in a hearing like every other type of penalty that is levied on a university campus, and should not be instantly ruled ineligible. The student-athlete could go to court, and if the institution wants to—we didn't—you could take both the NCAA and the institution to court and get in complicated state actions.

I think the 30 days is very short. All of you from the universities know that most committees can't finish anything for five months, and this is including disciplinary hearings.

MR. MATTHEWS: I understand what you are saying. This is one of the situations, as I understand it, where the institution has a dual obligation. The institution has the obligation of running to the student providing due process, but the institution also has the obligation to be in conformance with NCAA legislation. This is under the heading Obligations of Membership.

I would agree with you that if you think your duty to provide due process to the student outweighs your duty to be in conformance with the NCAA legislation, but I think for some period of time you may very well be not in conformance with the NCAA legislation in the discharge of your duty to the student in providing the due process.

My concern and the concern I draw to the attention of the Convention is that this, as now proposed, runs to situations where that dilemma does not have to be faced. It does, in effect, result in treating all clear, fac-

tual cases of ineligibility not resulting from institutional infraction, as if you could be in conformance with the NCAA membership obligation legislation for a period of 30 days when you know, as a matter of incontrovertible fact, your student-athlete is ineligible.

I am not suggesting that this Convention take any action to back off of due process. But this is one of the tough choices in most observations that the institution has made in order to discharge its dual duties as fairly as it can, both to the student and to the other members of this Association against whom its team is just about to compete.

MR. HORN: May I respond by saying I think the proof of the pudding is what is the current institutional practice. Obviously, in rulings on eligibility, none of us, to my knowledge, use the student disciplinary procedures. We do use them where there is an accusation that a record has been falsified, such as an ACT test, or whatever, a false signature. This would be the accusation in the case of one of our student-athletes. We can't accuse that student of that without a fair hearing. It isn't a question of his eligibility, it is a question of the serious offense such as a falsification of records.⁴⁶

The Proposal read as follows:

CONSTITUTION: Amend O.I. 20, following Constitution 4-2-(a), page 19, as follows:

“O.I. 20. If a student-athlete is ineligible under the terms of the Constitution, Bylaws or other legislation of the Association, the institution shall be obligated immediately to apply the applicable rule to the student-athlete and withhold him from all intercollegiate competition, except, where required by institutional policy, the student-athlete shall receive notice and an opportunity for hearing with respect to his ineligibility but in no case

⁴⁶ *NCAA Proceedings I*, *supra* note 25, at 152-54 (Business Session, Jan. 8, 1975).

shall such a hearing and a final decision extend beyond thirty days from notification by the NCAA. Subsequent to this action, the member institution may appeal to the NCAA Council, or a subcommittee designated by the Council to act for it, if the member concludes that the circumstances warrant restoration of the student-athlete's eligibility.[⁴⁷]

The source for the Proposal was the California State University at Long Beach,⁴⁸ and the stated intent was: "To allow 30 days for a due process hearing by the institution on questions of student-athlete eligibility where the institution has established procedures on questions of student discipline and sanctions."⁴⁹

The Proposal was defeated,⁵⁰ at which point Mr. Horn withdrew his sister Proposal 69 that would have required Institutional Hearings.⁵¹

The hypocrisy here was thick, because while the NCAA was simultaneously choosing its membership obligations over nonmember third-party due process rights, as if these competing concerns should have ever resulted in anything but the opposite conclusion, the NCAA defeated another proposal, which would have limited its members' right to access the courts before exhausting their administrative remedies.⁵²

C. NCAA's Lip Service to Due Process in 1976

At the 1976 Convention's Opening Session, NCAA President John A. Fuzak of Michigan State University, continued to explain the NCAA's legal plight:

All of us, I am sure, desire to remain optimistic as we see the American society become larger and increasingly more complicated. Mirroring our society at large,

⁴⁷ *Id.* at A-37 (emphasis omitted).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 154, A-37.

⁵² *Id.* at 141-43, A-33.

intercollegiate athletics continues to attract more interest, competitors and institutions which desire to sponsor intercollegiate programs and—as a result of this—our athletic community becomes more complicated. It is my view that most of the things which make intercollegiate athletics more complicated are healthy signs of widespread support and interest.

One development which prompts pessimism, however, is the continued tendency of some member institutions, some staff members of institutions and some athletic representatives of member institutions to frustrate the application of the NCAA rules by testing their validity through state and Federal court proceedings. Not only does this activity drain a substantial amount of money from NCAA funds—money which could be used for more constructive and useful purposes—it also creates an unequal application of rules which is contrary, it seems to the NCAA Council, to the fundamental reason a member institution joins a voluntary association.

In all of the multiple court tests of NCAA rules and procedures, there has been only one significant decision against the NCAA. This had to do with the judgment that the alien age rule of Bylaw 4 was discriminatory and should be revised. Otherwise, the NCAA has successfully defended its rules and its role in all instances, although in a number of cases this has been achieved only at the court of appeals level.

What does transpire, however, is for an institution, a staff member or a booster to secure a temporary restraining order or a preliminary injunction which enables the institution to utilize the services of a student-athlete who otherwise would be ineligible to compete. It is a recognized fact in our judiciary system that frequently the judge of the area is inclined to rule in favor of the athlete or the institution in his immediate jurisdiction as opposed to some national governing body far re-

moved. And for a part or all of a season, a student-athlete who should be ineligible is permitted to compete to the disadvantage of institutions against which his college is competing.

Furthermore, during the past fall, we have seen coaches of member institutions attempt to frustrate the decisions of NCAA Conventions by attempting to suspend the rules that the voting delegates of our members have decided to impose. It is interesting that in some of these instances, the coaches' institutions did not argue the particular rule in question on the Convention floor. The NCAA Council believes it is time to attempt to slow down this type of activity and has before you a proposal in this connection which was not favorably acted upon at last January's Convention.

In essence, this proposal suggests that member institutions exhaust internal remedies within the Association before attempting to frustrate the Association's rules by legal action. There are those who argue that it is unfair to suggest that an institution should not seek legal recourse, for example, from the time the Council rejects an appeal, if indeed the appeal is rejected and the time the annual Convention could consider the institution's argument—the annual Convention being the ultimate authority in hearing internal appeals. There may be some point to that argument, but let me say also that it is extremely unfair to the vast majority of member institutions and their athletes to have an institution use an ineligible player—at least a player adjudged to be ineligible by the appropriate NCAA committees and appeal boards. Under court proceedings at the present time, it would be possible for a college with such an ineligible player to win a conference championship and compete in the NCAA tournament before the matter could be finally adjudicated in the courts. We think that this unfairness far outweighs any unfairness which might flow from the fact that the institution should exhaust its internal remedies

before seeking court relief[.] The Council's proposal in this regard isn't a total cure of the problem—but it certainly would be a step in the right direction of reminding member institutions of certain fundamental obligations they assume when they voluntarily decide to assume membership in a voluntary association.⁵³

At the Division I Round Table later that day, a further discussion on legal costs was summarized as follows:

It was requested that the Council consider either interpretations or amendments to No. 215 which would clarify the meaning of an institution's "indirect" involvement in litigation as well as the institution's "failure to cooperate fully with the Association in defense of such an action in which the Association is involved."⁵⁴

At the Division II Round Table also that same day, yet another discussion on legal costs was summarized:

[S]pecial attention [was given] to No. 215 which would require a member institution to pursue internal appeal and review procedures of the Association before becoming involved in legal actions designed to exempt the member from legislation adopted by the Association. If such a member ignored this provision and was not sustained in the legal action, then it may be charged for all or part of the Association's legal expenses and subject to enforcement proceedings for violating the membership requirement.

A debate ensued in which opposite viewpoints were expressed. One delegate noted his institution's law firm feels the legislation is not properly drafted and that individuals should not be denied the right to go to court. An opposing view was presented to the effect that insti-

⁵³ NCAA, *Proceedings of the 3rd Special Convention and 70th Annual Convention of the NCAA* 62-63 (Opening Session, Jan. 15, 1976) [hereinafter *NCAA Proceedings II*].

⁵⁴ *Id.* at 70 (Division I Round Table, Jan. 15, 1976).

tutions have a great deal of control over student-athletes and others who go to court and that some members resented the Association having to pay high legal fees to solve problems of member institutions.⁵⁵

Notwithstanding all of this, the NCAA membership, again acting in its own hypocritical best interests, defeated yet another proposal that would have limited its right to access the courts before exhausting their administrative remedies.⁵⁶

However, the NCAA membership threw college athletes a bone in the form of a policy, as opposed to a bylaw, procedure, or rule, regarding due process. Raymond J. Whispell, a professor of physical education and the director of athletics at Muhlenberg College, as well as a vice president of the NCAA and a member of its Council,⁵⁷ made the following proposal to adopt a Due Process Policy (Proposal 219):

This has to do with the recommended policy only, and is to encourage a member institution to provide an informal hearing to a student-athlete involved in the application of NCAA eligibility regulations by the institution. I move adoption of Proposal No. 219 [Due Process Policy].

[The motion was seconded.]

MR. WEAVER: I would like to speak in opposition to No. 219. You know, in these times it is unwise to be against due process. I feel this should be redrafted. The first thing that is wrong with this, I don't think it is possible to do what the legislation requests, and that is to not delay or set aside your requirements of O.I. 18. O.I. 18 demands immediately the institution withhold the athlete from intercollegiate competition and yet No. 219 requires that a hearing be given after action is taken. My

⁵⁵ *Id.* at 75 (Division II Round Table, Jan. 15, 1976).

⁵⁶ *Id.* at 184-88, A-90, A-134 (Final Business Session, Jan. 17, 1976).

⁵⁷ *New Members Elected to Council*, THE NCAA NEWS (Feb. 1, 1974), http://web1.ncaa.org/web_files/NCAANewsArchive/1974/19740201.pdf.

second objection, I believe in a hypothetical case it would be possible for a member of your institution outside of the athletic department, such as a vice-president of student affairs, someone in that capacity, to prevent or to require one of your athletes not to take part in an athletic practice because of disruption on your campus, et cetera. He would be able to compete and practice until the hearing had been given. I think the wiser thing to do would be to give the opportunity to remove from practice and with a certain time limit in which the hearing should be given.⁵⁸

The Proposal read as follows:

RECOMMENDED POLICIES: Add a new Recommended Policy 13, page 110, as follows:

“In the administration of their athletic programs in accordance with NCAA regulations and their conditions and obligations of membership in the Association, member institutions may find it necessary, from time to time, to terminate or suspend the eligibility of student-athletes for participation in intercollegiate competition and organized athletic practice sessions. In any such case the member institution should notify the student-athlete concerned and afford him an opportunity for an informal hearing before the faculty athletic representative, director of athletics or other appropriate institutional authority before action is taken, it being understood that the hearing opportunity shall not delay or set aside the member’s obligations required by Constitution 4-2-(a)-O.I. 18 and Section 9 of the Enforcement Procedure. This hearing opportunity will avoid possible mistaken actions affecting the student-athlete’s eligibility and should satisfy due process procedures if any be required.”⁵⁹

⁵⁸ *NCAA Proceedings II*, *supra* note 53, at 189-90 (Final Business Session, Jan. 17, 1976).

⁵⁹ *Id.* at A-92 (emphasis omitted).

The source for the Proposal was the NCAA Council,⁶⁰ and the stated intent was: “To encourage a member institution to provide an informal hearing to a student-athlete involved in the application of NCAA eligibility regulations by the institution.”⁶¹

The Proposal was approved, and it was effective immediately.⁶²

So why did the NCAA throw this bone, when it had defeated college-athlete due process rights just the year before? Two decades later, one of the NCAA’s outside general counsels explained:

In 1975, the Supreme Court decided in *Goss v. Lopez* that public high school students who, without a hearing, had been suspended from school for misconduct were denied due process. The Court found that “the authority possessed by the State to prescribe and enforce

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*; see also 1976-77 MANUAL OF THE NCAA 115 (1976) (recommended policy and practice for intercollegiate athletics). This section of the Manual states, “[t]he Association’s Council and Convention, from time to time, have adopted recommended policies for the guidance of member institutions in the conduct of their intercollegiate programs.” 1976-77 MANUAL OF THE NCAA, *supra* at 112. The numbering was changed to Policy 12 in 1979, 1979-80 MANUAL OF THE NCAA 139-40 (1979), and it was changed again to Policy 11 in 1985, 1985-86 MANUAL OF THE NCAA 201-02 (1985). When the NCAA Manual was reorganized in 1989, all policies were deleted from the Manual. According to one scholar:

Although Policy 11 [formerly Policies 12 & 13] is not included in the new 1989-90 NCAA MANUAL, it is officially under review within the NCAA organizational structure and has not been totally abandoned. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, “WHERE DID IT GO?” 15 (1989). Indeed, it and thirteen other policies are under review because they reflect the philosophical position of some of the NCAA’s membership and may still be recommended by an “appropriate committee” for adoption as legislation. *Id.*; Telephone interview with Ted C. Tow, Associate Executive Director of the NCAA (Nov. 17, 1989) (notes on file with author). Furthermore, the 1989-90 NCAA MANUAL fails to track even the casual expressions of due process concerns in Policy 11. This conspicuous omission may suggest an even further institutional retreat by the NCAA from due process protection for its members.

John P. Sahl, *College Athletes and Due Process Protection: What’s Left after National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 109 S. Ct. 454 (1988)?, 21 ARIZ. ST. L.J. 621, 639 n.95 (1989).

standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards.” The Court elaborated on the process it believed was due and stated that a student facing temporary suspension should be given notice of the charges against him and an opportunity to present his side of the case. Thereafter, to avoid the possibility of factual mistakes and to assure the opportunity of input from the student-athlete, in 1975 the NCAA adopted Recommend Policy 13. Member institutions were advised to provide an informal hearing to a student-athlete before declaring him ineligible for intercollegiate athletics. This pertained to both those situations where the ineligibility was the result of a finding by the Committee on Infractions and where the institutions voluntarily declared a person ineligible.⁶³

However, lip service was just that, lip service. This due process policy failed to increase college athletes’ rights,⁶⁴ because the outcome

⁶³ John Kitchin, *The NCAA and Due Process*, KAN. J. L. & PUB. POL’Y, Spring 1996, at 71, 72-73 (footnotes omitted).

⁶⁴ See Sahl, *supra* note 62, at 639-40. As Professor Sahl has further explained,

The procedural deficiencies . . . suggest that the NCAA enforcement procedures fail to provide student-athletes with adequate due process for adjudicating their interests, especially their intercollegiate eligibility. These deficiencies may reflect a more fundamental insensitivity for the notion of due process that should serve as a check on the NCAA’s unbridled authority to control intercollegiate sports. This insensitivity is illustrated in the NCAA’s seemingly perfunctory directive to institutions that they should notify student-athletes, and afford them an opportunity for an informal hearing, before a director of athletics or some other appropriate institutional authority disciplines them. “This hearing . . . should satisfy due process procedures if any are required . . . it being understood that the hearing opportunity shall not delay or set aside the member’s obligations required by [the] Constitution”

In other words, the institution is reminded that the NCAA has predetermined the outcome and penalty for a student-athlete who has violated NCAA policy and the only remaining steps are notification, some sort of hearing, and timely enforcement of the penalty. This NCAA directive regarding institutional hearings to adjudicate student-athletes’ interests exhibits, at best, only a casual affinity for due process and fundamental fairness. This directive

of such a hearing appeared predetermined to result in ineligibility.⁶⁵ In fact, not a single reported court decision in the last four decades involving the NCAA addressed the due process policy.⁶⁶ Nor has any court addressed a corollary interpretation allowing NCAA members to retain independent counsel for college athletes facing eligibility issues, which later became a bylaw.⁶⁷

also undermines the NCAA's position that it is concerned with the welfare of student-athletes and interested in teaching them "positive" moral values. Given the NCAA's casual affinity for due process and procedural deficiencies in its enforcement procedures, there is every reason to expect student-athletes to continue to turn to the courts for protection.

Id. (footnotes omitted).

⁶⁵ See Porto, *supra* note 11, at 1169-72 (discussing same and the need for higher standards of fairness).

⁶⁶ But see NCAA v. Yeo, 171 S.W.3d 863 (Tex. 2005). In *Yeo*, counsel used the due process policy in oral argument without effect. See Transcript of Oral Argument of Diane M. Henson on Behalf of the Respondent at para. 33, NCAA v. Yeo, 171 S.W.3d 863 (Tex. 2005) (No. 03-0753) [hereinafter *Yeo* Oral Argument].

⁶⁷ See 1979-80 MANUAL OF THE NCAA 196 (1979) (stating that student-athletes may receive legal representation from the institution without charge). NCAA Bylaw 14.11.2.1 codifies this idea. DIV. I MANUAL, *supra* note 6, art. 14.11.2.1, at 167. The reason this is necessary should be obvious, but just try to get paid, if you accept such a retention:

There — there is a — I don't know if the [c]ourt really wants me to spend much time on the NCAA issues or not. The NCAA and this whole system is set up so that [the university] makes all the decisions. It really does make the decisions. The [university] is supposed to clear [sic] the student ineligible. They're supposed to impose the remedies the — the period of action, everything happens and the whole system is based on that [the university] will have to do this. And if [the university] doesn't, there is a big hammer because the NCAA has a rule that says, "You must enforce these rules, and if you don't, we can do pretty much anything to you." And if you read some other cases, you can see what happens. If you don't cooperate fully with the NCAA and jump when they say, "Jump," and you just tell them, "How high?" they can do — they can stop your program. They can suspend your program. It's very much a very big hammer. And during this timeframe, when [the plaintiff's] case was going on, [the university] was being investigated for a major infraction dealing with their baseball team. Their World Series trophy was subject to being taken away from them. And so, to suggest that somehow [the university] couldn't [sic] carry the ball in this case when they have fought us at every place. They fought us at the TRO. They fought us at the court at — at injunction. They fought us by filing a bogus notice of appeal

Today, the NCAA and its members do not, as a matter of policy, procedure, or rule, provide written notice or an evidentiary hearing to college athletes before taking adverse eligibility actions against them. The NCAA also fails to provide legal counsel to college athletes, as a matter of right, when an allegation regarding their eligibility first arises or at any time thereafter.⁶⁸ When challenged, the NCAA essentially takes the position that its members deprived the student-athlete of due process, not the NCAA. In politics and public relations, this strategy of plausible deniability can be very effective, if no one looks too deep.

I experienced this earlier this year as lead counsel⁶⁹ for James A. Paxton (James) in the case of *Paxton v. University of Kentucky*. The sole issue was whether he had a right to a written notice, an evidentiary hearing, and similar protections afforded by the University of Kentucky's (UK) *Code of Student Conduct* and the Kentucky Constitution. Both the trial and appellate courts held that he—and apparently, all other college athletes—has no due process rights whatsoever.⁷⁰ James

try[ing] to supersede this thing. They haven't paid our attorneys fees when they said that they would since we were hired to help this athlete under NCAA rules on eligibility. They have done everything they can to fight this thing. And so, for this issue to be — we can't trust [the university] to — to carry the ball as really untrue and not may [sic] to trial judge, so many of the technical arguments that the NCAA has made in their intervention. We're [sic] never made to the trial judge. The trial judge — and we have a lot of former trial judges on this [c]ourt. The trial judge deserved an opportunity to hear somebody's arguments that they didn't preserved error on.

Yeo Oral Argument, *supra* note 66, at para. 76. As an aside, Ms. Yeo's lead attorney is now a Texas Court of Appeals Judge, the Honorable Diane M. Henson.

⁶⁸ In *Oliver I*, *supra* note 5, *Oliver II*, *supra* note 5, *Oliver III*, *supra* note 5, and *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001), discussed below, the NCAA attempted to intimidate the plaintiff college athletes. The NCAA told the plaintiffs they were receiving illegal benefits unless they paid hourly legal fees on a net/30 basis, subjecting their athletic eligibility to question. Appalled, both plaintiffs' counsel refused to let the NCAA intimidate their clients. But what a great idea: deprive the plaintiff of the right to counsel by coercion, making an NCAA win a foregone conclusion due to the squadron of lawyers on its side.

⁶⁹ My co-counsels were Thomas W. Miller, Esq., Elizabeth C. Woodford, Esq., and Peter L. Ostermiller, Esq.

⁷⁰ *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct., Jan. 19, 2010) (motion to dismiss and motion for temporary injunction both denied), *motion for interlocutory relief denied*, No. 10-CA-000178-I (Ky. Ct. App. Feb. 19, 2010). *But see Oliver II*, *supra* note 5, at ¶¶ 20-22 (recognizing claims for breach of contract and tortious

interference with contract for failing to give college athlete due process rights guaranteed under college's code of student conduct). The *Paxton* case was incredible, because UK admitted there were no allegations, charges, or evidence against James; the sole reason for withholding James from intercollegiate play was his refusal to be interviewed by the NCAA without cause and without being given the rights afforded to him under the UK Code of Student Conduct. *Paxton v. Univ. of Ky.*, No. 2010-CA-000178-I, slip op., at 4-5. See also Jordan I. Kobritz, *Presumption of Guilt Prevents Athlete from Competing*, LEGAL ISSUES IN COLLEGIATE ATHLETICS, Apr. 2010, at 3-4 (discussing the unfairness visited upon James). This unfairness was not lost on UK's student body. Editorial, *Paxton Case Lacks Necessary Fairness*, KY. KERNEL, Jan. 18, 2010, <http://kykernel.com/2010/01/18/paxton-case-lacks-necessary-fairness/>. The *Paxton* case has received hundreds of news stories and topical commentary, which are easily available via the Internet. For coverage by the *Lexington Herald-Leader*, please see *Attorney Explains Why UK Pitcher Left*, LEXINGTON HERALD-LEADER, Mar. 3, 2010, <http://www.kentucky.com/2010/03/03/1163964/attorney-explains-why-uk-pitcher.html>; Ashlee Clark, *Pitcher To Stay On UK Team, Keep Scholarship*, LEXINGTON HERALD-LEADER, Dec. 5, 2009, <http://www.kentucky.com/2009/12/05/1046132/pitcher-to-stay-on-uk-team-keep.html>; Ashlee Clark, *UK Attorneys Ask Judge to Toss UK Pitcher's Lawsuit*, LEXINGTON HERALD-LEADER, Jan. 7, 2010, <http://www.kentucky.com/2010/01/07/1084746/uk-attorneys-ask-judge-to-toss.html>; Ashlee Clark, *UK Loses Bid to Get Baseball Player's Lawsuit Dismissed*, LEXINGTON HERALD-LEADER, Jan. 15, 2010, <http://www.kentucky.com/2010/01/15/1097127/uk-loses-bid-to-get-baseball-players.html>; Ashlee Clark, *UK Pitcher Sues University*, LEXINGTON HERALD-LEADER, Dec. 4, 2009, <http://www.kentucky.com/2009/12/04/1044559/uk-pitcher-sues-university.html>; Jennifer Hewlett, *Appeals Court Agrees to Hear UK Baseball Player's Case*, LEXINGTON HERALD-LEADER, Jan. 28, 2010, <http://www.kentucky.com/2010/01/28/1116007/appeals-court-agrees-to-hear-uk.html>; Jennifer Hewlett, *No 'Play Ball' for UK Pitcher: Dispute with NCAA Keeps UK Pitcher on the Sidelines as Season Opens*, LEXINGTON HERALD-LEADER, Feb. 20, 2010, <http://www.kentucky.com/2010/02/20/1147378/uk-pitchers-appeal-denied-student.html>; *Judge Says UK Can Keep Star Pitcher from Playing*, LEXINGTON HERALD-LEADER, Jan. 16, 2010, <http://www.kentucky.com/2010/01/16/1098012/news-briefs.html>; Andy Mead, *Ex-UK Pitcher Paxton Will Aim for June Draft*, LEXINGTON HERALD-LEADER, Feb. 28, 2010, <http://www.kentucky.com/2010/02/28/1160377/uk-pitcher-who-left-team-will.html>; Patrick Sullivan, *Paxton Gives Up Fight, Leaves UK: UK Refused to Play Pitcher Pending NCAA Investigation*, LEXINGTON HERALD-LEADER, Feb. 27, 2010, <http://www.kentucky.com/2010/02/27/1159206/pitcher-who-sued-uk-leaves-team.html>; and *UK Baseball Starts Season Friday*, LEXINGTON HERALD-LEADER, Feb. 19, 2010, <http://www.kentucky.com/2010/02/19/1146810/another-good-season-not-enough.html>. For stories before and after the dispute, please see *Baseball America Names Paxton a Top Pro Prospect*, LEXINGTON HERALD-LEADER, Sept. 18, 2009, <http://www.kentucky.com/2009/09/18/940423/baseball-america-names-paxton.html>; and *Ex-Cat Paxton Signs with Independent Team in Texas*, LEXINGTON HERALD-LEADER, Apr. 2, 2010, <http://www.kentucky.com/2010/04/02/1207155/ex-cat-paxton-signs-with-independent.html>.

left UK during his senior year as a protest of this inequity.⁷¹ UK should have been grateful to have James on campus after he rejected a \$1,000,000 offer from the Toronto Blue Jays so he could try to help his team win a College World Series.⁷² James paid a dear price for having the integrity to stand up for himself against this abomination, with his draft stock falling considerably this year.⁷³

D. NCAA's Adoption of Procedures for the Restitution Rule in 1976

On March 2, 1976, the NCAA Council:

[P]roceeded to take the following actions regarding application of the restitution provisions of Section 10:

(1) It was VOTED

“That whenever the Council institutes restitution proceedings against an institution, the Council shall give notice to the institution and to its conference, if any, of such action and of the availability of a hearing before the Council at which the institution would be permitted to present either oral or written arguments.” (Voice Vote.)

(2) It was VOTED

“That the President may appoint a subcommittee of five members of the Council to conduct the hearing specified above in situations where it is not convenient for the full Council to attend the hearing.” (Voice Vote.)

(3) It was the sense of the meeting that the action(s) taken by the subcommittee as specified above

⁷¹ Sullivan, *supra* note 70.

⁷² See Liz Mullen, *Paxton Leaves Kentucky After Losing Appeal Over NCAA Interview*, SPORTS BUS. J., Mar. 15, 2010, at 18.

⁷³ See Lyndon Little, *Ladner's James Paxton Drafted by Seattle Mariners*, VANCOUVER SUN, June 9, 2010, http://www.vancouversun.com/story_print.html?id=3128627.

would be binding; the institution could appeal the sub-committee action(s) to the next regularly scheduled meeting of the Council.⁷⁴

Does it surprise anyone the NCAA provides no such notice or hearing to any college athlete adversely affected by such restitution?

E. NCAA's Only Invocation of the Restitution Rule in 1976

One would expect the NCAA would have used its Restitution Rule more than once; however, that is not the case. In March and April 1976, the NCAA Council voted to invoke the Restitution Rule against Oregon State University⁷⁵—the only time it has ever done so—following the Ninth Circuit's reversal of a preliminary injunction in *Shelton v. NCAA*.⁷⁶

As was later reported by the *NCAA News*:

In accordance with action taken by the NCAA Council under the restitution provisions of the Association's enforcement procedure, Oregon State University has forfeited 15 basketball games in which an ineligible player, Lonnie Shelton, participated during the 1975-76 season.

The forfeits leave Oregon State University with a 1975-76 season record of three wins and 24 losses. The three remaining victories occurred in games played in February 1976 after Shelton lost a [f]ederal [c]ourt case involving his intercollegiate eligibility and no longer participated on the [u]niversity's basketball team.

Shelton forfeited his amateur standing under NCAA rules by signing a professional basketball contract in June 1975, plus other actions, and he was declared ineligible by the [u]niversity before the 1975-76

⁷⁴ NCAA, *Minutes of the NCAA Council*, Item 1(e)(1-3) (Mar. 2, 1976).

⁷⁵ *Id.* at Item 1(e)(4) (Mar. 2, 1976); *id.* at Item 2(k), 2(o) (Apr. 26-28, 1976).

⁷⁶ *Shelton v. NCAA*, 539 F.2d 1197, 1199 (9th Cir. 1976).

season. However, he was permitted to participate on the [u]niversity's intercollegiate basketball team while ineligible by virtue of a court order granted by a Federal District Court in Oregon.

. . . .

The NCAA successfully appealed the District Court decision. Prior to the completion of the 1975-76 season, the Ninth Circuit Court of Appeals upheld the NCAA's amateur rule and overturned the District Court order.

After the Circuit Court's decision, the NCAA Council reviewed the effect of Shelton's participation against other member institutions and voted to invoke several of the Association's restitution provisions. The membership has authorized the Council to apply these regulations whenever an ineligible student-athlete competes under a court order which is ultimately determined to be improvidently issued.

"The restitution provisions were adopted by the membership in the interest of fairness to institutions forced by court order to compete against teams including an ineligible student-athlete," said John A. Fuzak, president of the NCAA. "The provisions are designed to eliminate any competitive advantage gained by an institution while permitting an ineligible student-athlete to participate under a court order which is eventually overturned."

"It should be noted," continued Fuzak, "that the Council's decision was not based on any determination that Oregon State University was involved in initiating or supporting the court proceedings. The [u]niversity has cooperated fully in applying the restitution requirements imposed by the Council. In arriving at its decision, the Council concluded that the [u]niversity's opponents were those whose interests were disadvantaged throughout the

period of Shelton's ineligible participation, regardless of the [u]niversity's involvement in the court proceedings."

In other actions related to this case, the Council required Oregon State University to vacate the individual records and performances achieved by Shelton during his ineligible participation.

The [u]niversity's basketball team compiled a 15-8 won-lost record during the period in which Shelton participated under the protection of the District Court order, and he averaged 17.8 points and 7.7 rebounds a game during this period.⁷⁷

However, contrary to what NCAA President Fuzak, who was by then the associate dean of the School for Advanced Studies in Education at Michigan State University, told the *NCAA News* at the time, a review of the NCAA Council's March 2 meeting, which he chaired, reveals that application of the Restitution Rule to a member institution depended upon the member *permitting* the college athlete to play:

The provisions of Section 10 of the enforcement procedures specify that the Council may take certain actions against an institution (including forfeiture of victories) which *permits* a student-athlete to participate in intercollegiate competition contrary to NCAA legislation, but in accordance with the terms of a court order, once the court order has been finally determined to have been improvidently issued.⁷⁸

Left unsaid was how a member of an unincorporated association like the NCAA could legally defy such a court order. Orders and judgments are binding on members of an unincorporated association.⁷⁹ The NCAA seemingly expected members not to *permit* such college athletes

⁷⁷ *Oregon State Forfeits 15 Basketball Wins*, NCAA NEWS, Nov. 15, 1976, at 1, 6.

⁷⁸ NCAA, *Minutes of the NCAA Council*, Item 1(b) (Mar. 2, 1976) (emphasis added); see also *id.* at Item 1(a) ("Oregon State University . . . *permitted* student-athlete . . . to participate in basketball [The p]laintiff . . . was *permitted* by the [u]niversity to participate in 23 basketball games" (emphasis added)).

⁷⁹ 46 AM. JUR. 2D *Judges* § 21 (2010).

to play, as the court could not enforce the resulting contempt order against a member unless it was a party to the lawsuit.⁸⁰

The easy answer to this obfuscation is to punish the NCAA until it directs members to follow the court's order. The NCAA could easily adopt a simple rule that all members are required to follow valid court orders issued against the NCAA. This would require the NCAA to actually respect the rule of law, when it behaves as if it is above the law.

F. NCAA's Only Interpretation of the Restitution Rule in 1976

On October 8, 1976, at the request of Oregon State University, the NCAA Council's Committee on Interpretations issued the only interpretation of this rule:

(1) Determined that the records and performances which must be stricken per paragraph (a) of that Section are those achieved by the team and by the ineligible student-athlete, not those by other individuals on the team.

(2) Agreed that a forfeit must be considered a loss per paragraph (b), and therefore those games forfeited must be recorded as losses (rather than as "no contest") in the institution's season record by the institution and by the NCAA; further, that while neither the institution nor the NCAA has the authority to require opponents receiving those forfeits to alter their season records accordingly, [the institution] should strongly encourage their opponents to do so, and those institutions' season records will be so altered in the NCAA's files; finally, that the institution's conference also should be encouraged to adjust its records to reflect the appropriate

⁸⁰ College athletes generally have no wish to sue their own colleges or universities. Those colleges or universities are often not subject to the jurisdiction of the state court in which the lawsuit commences against the NCAA, which is usually the college athlete's county of residence. Because the majority of the Division I colleges and universities are public, a host of sovereign immunity issues arise. Other hurdles exist as well, but the point is that college athletes face great procedural difficulties when attempting to enforce an injunction.

forfeitures and that the NCAA's records for the conference will be so adjusted.

(3) Concluded that items received by the individuals on the team at two basketball tournaments shall not be considered "earned" awards as set forth in paragraph (c) inasmuch as the same items were given to all participants on all teams in those tournaments.⁸¹

As such, the NCAA made clear that all teammates on a particular team would suffer if a court ordered an eligible college athlete, who was illegally deemed ineligible, be allowed to play and if a member actually respected the law and allowed the athlete to play.

G. NCAA's Amendment to the Restitution Rule in 1977

At the NCAA's Seventy-first Annual Convention, the summary of the Division II Round Table discussion on legal costs was as follows:

Mr. Marshall spoke strongly in favor of Proposal No. 129, pointing out the Association was spending a great deal of money on legal costs which might better be spent on services for the membership. Andrew Brown opposed the measure, feeling it might curtail legal due process. Mr. Frank pointed out the proposal was designed to discourage legal remedy before NCAA procedures had been followed to conclusion, not an institution ultimately resorting to legal redress.⁸²

Thereafter, Hubert Heitman, Jr., professor of animal science at the University of California at Davis, and a vice president and member of the NCAA's Council, made the following proposal to amend the Restitution Rule (Proposal 27): "Mr. President, on behalf of the Council, I

⁸¹ NCAA, *Official Interpretation: Restitution Provisions*, Item g (Oct. 8, 1976) (considering questions submitted by Oregon State University). For whatever reason, the *NCAA News* failed to report this, and it was not contained in the *NCAA 1977-1978 Manual*. See NCAA, 1977-78 *MANUAL OF THE NCAA* 149-241 (1977) (page range containing all NCAA interpretations to date).

⁸² NCAA, *Proceedings of the 71st Annual Convention of the NCAA* at 58 (Division II Round Table, Jan. 10, 1977) [hereinafter *NCAA Proceedings III*].

should like to propose adoption of the consent package contained in Proposals 10 to 27 [Restitution Rule], except for No. 22. [The motion was seconded]”⁸³

The amendment read:

ENFORCEMENT PROCEDURES: Amend Section 10, page 122, as follows:

“Section 10. If a student-athlete who is ineligible under the terms of the Constitution, Bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or the Association, or both, and said injunction is subsequently voluntarily vacated, ~~or finally determined to have been improvidently issued~~ stayed, reversed or finally determined by the courts that injunctive relief is not or was not justified, or finally determined to have been improvidently issued, the Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions.”⁸⁴

The source for this amendment was the NCAA Council (Committee on Infractions),⁸⁵ and the stated intent for Proposal 27 was: “To clarify the original intent of Section 10 that restitution may be invoked without a specific finding or conclusion by a court that an injunction was improvidently issued.”⁸⁶ The NCAA Council approved the amendment, effective immediately.⁸⁷

⁸³ *Id.* at 63 (Business Session, Jan. 11, 1977).

⁸⁴ *Id.* at A-13.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*; see also NCAA, 1977-78 MANUAL OF THE NCAA 127 (1977). The word *event* was deleted from Section 10(g), even though there was no authorization to do so during the Convention. *Id.* at 128.

The next day, NCAA President John A. Fuzak⁸⁸ presided over a lengthy debate regarding the Proposal 129. The membership acted in their hypocritical best interests to defeat the proposal the third year in a row.⁸⁹ The proposal would have limited their right to access the courts before exhausting their administrative remedies.⁹⁰

It is unclear as to why the NCAA had not realized, by this point, something was wrong with the concept that those who could vote would have access to the courts, while those who could not vote would not have such access. Nevertheless, this obstinacy or obtuseness continued unabated.

H. NCAA's Amendments of the Restitution Rule in 1980

At the NCAA's Seventy-Fourth Annual Convention, Charley Scott, the associate academic vice president of the University of Alabama, former member of the NCAA's Council, and new member of the NCAA Executive Committee, made the following proposal to amend the Restitution Rule (Proposal 50):

In behalf of the NCAA Council, I move adoption of Proposal No. 50 [Restitution Rule].

[The motion was seconded.]

Proposal No. 50 is another proposal to clarify current policy. It makes no change in the policy. It simply separates for clarification the actions related to individuals and teams.⁹¹

The amendment read as follows:

⁸⁸ For a description of the zeitgeist, see David D. Smale, *Fuzak Presided at Four Conventions*, NCAA NEWS, Jan. 1, 1992, at 1, 17 (describing the turbulent times for the NCAA).

⁸⁹ *NCAA Proceedings III*, *supra* note 82, at 129, A-70 to A-71.

⁹⁰ *Id.* at 155-60, A-70 to A-71 (Proposal 129).

⁹¹ NCAA, *Proceedings of the 74th Annual Convention of the NCAA* at 100 (Business Session, Jan. 8, 1980).

ENFORCEMENT PROCEDURE: Amend Section 10-(a), (b) and (c) and add new paragraphs (b) and (e), page 148, relettering subsequent paragraphs, as follows:

“(a) Requirement that individual ~~or team~~ records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;

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

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

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

“(e) Requirement that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;”⁹²

Mr. Scott also made the following additional proposal to amend the Restitution Rule (Proposal 51):

Mr. Chairman, I move adoption of Proposal No. 51 [Restitution Rule].

[The motion was seconded.]

Item No. 51 relates to another action in the same Section 10. The actions are available to the Council in the event that a student-athlete who is ineligible is permitted to participate. This particular section provides

⁹² *Id.* at A-30.

some relief in that the share of the television receipts would not include that portion which has been shared with the conference members.

In the second part, this act provides that in the event such ineligible student-athlete does participate, that action can be taken and states that any such funds thus remitted will be devoted to the postgraduate scholarship program.⁹³

The amendment read as follows:

ENFORCEMENT PROCEDURE: Amend Section 10-(f), page 148, as follows:

“(f) Requirement that the institution shall remit to the NCAA the institution’s share of television receipts (other than the portion thereof shared with other conference members) for appearing ~~in any national or regional telecast under the NCAA football television plan where on any television series or program subject to the administration or control of the NCAA if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program~~”⁹⁴

The source for these Amendments was the NCAA Council,⁹⁵ and the stated intent for Proposal 50 was: “To conform these procedures to the current policy; i.e., that individual and team records, performances and awards may be considered separately in applying the restitution provisions.”⁹⁶ The stated intent for Proposal 51 was: “To

⁹³ *Id.* at 100.

⁹⁴ *Id.* at A-30 to A-31.

⁹⁵ *Id.*

⁹⁶ *Id.* at A-30.

clarify the determination of the amount of the institution's share of television receipts under this regulation and to specify that this regulation may apply to the involvement of the ineligible student-athlete (regardless of his ability) in any NCAA-controlled television series or program."⁹⁷ These Amendments were approved, and they were effective immediately.⁹⁸

I. NCAA's Modification of the Restitution Rule in 1985

Sometime in 1985 or very early 1986, the NCAA modified Section 10(i) as follows, yet there is no record in the 1985 or 1986 Conventions Proceedings or in the 1985 Fifth Special Convention Proceeding of it having done so:

(i) Requirement that the institution that has been represented in an NCAA championship by such a student-athlete shall return 90 percent of its share of the net receipts from such competition in excess of the regular expense reimbursement, or if said funds have not been distributed, requirement that they be withheld by the NCAA executive director.⁹⁹

J. NCAA's Attempted Amendment of the Restitution Rule in 1986

In January of 1986, at the NCAA's Eightieth Annual Convention, Proposal 35, again promulgated by the NCAA Council to amend the Restitution Rule, was withdrawn without published explanation (along with related Obligations of Membership—Litigation Responsibility, Obligations of Membership—Internal Remedies, and Obligations of Membership—Legal Costs, Proposals 32-34).¹⁰⁰ The proposal would have amended Enforcement Procedure Section 10 as follows:

⁹⁷ *Id.* at A-31.

⁹⁸ *Id.* at A-30 to A-31; *see also* NCAA, 1980-81 MANUAL OF THE NCAA 156-57 (1980).

⁹⁹ NCAA, 1986-87 MANUAL OF THE NCAA 227 (1986).

¹⁰⁰ NCAA, *Proceedings of the 80th Annual Convention of the NCAA* at 157 (Jan. 14, 1986).

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or the Association, or both, and said injunction is subsequently voluntarily vacated, stayed, reversed, declared to be moot, rendered unenforceable, or finally determined by the courts that injunctive relief is not or was not justified, the Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions[.]¹⁰¹

The stated intent would have been “[t]o affirm that the restitution provisions of Section 10 of the enforcement procedure may be applied if the lawsuit in question is declared to be moot or if a restraining order or injunction otherwise ceases to be enforceable.”¹⁰² There was no explanation as to why these proposals were withdrawn.

K. NCAA’s Amendments and Modifications of the Restitution Rule 1987-2000

In 1989 the NCAA completely overhauled the format of its manual, and in the process, the Restitution Rule became Bylaw 19.6, which was edited for readability and style without making any substantive changes.¹⁰³ In 1993, the NCAA renumbered the Restitution Rule as Bylaw 19.7 without making any substantive changes.¹⁰⁴ In 1994, the NCAA again renumbered the Restitution Rule as Bylaw 19.8 without making any substantive changes.¹⁰⁵

¹⁰¹ *Id.* at A-28 (emphasis omitted).

¹⁰² *Id.*

¹⁰³ NCAA, *1989 NCAA Convention Proceedings* at A-68 to A-69 (Jan. 11, 1989); *see also* NCAA, 1989-90 NCAA MANUAL 272 (1989).

¹⁰⁴ NCAA, *NCAA Proceedings* at 293-94, A-75 to A-76 (Jan. 14, 1993); *see also* NCAA, 1993-94 NCAA MANUAL 322 (1993).

¹⁰⁵ NCAA, 1994-95 NCAA MANUAL 345 (1994).

In 1997 the NCAA restructured itself, and part of that restructuring included issuing separate manuals for its three divisions; however, the Restitution Rule remained applicable to all of these divisions, and its numbering remained consistent across all three manuals, even though the manuals differed to some degree on other rules.¹⁰⁶ The term *Council* was changed to *Management Council*.¹⁰⁷ In 1999 the term *executive director* was changed to *president*.¹⁰⁸

L. NCAA's Amendments of the Restitution Rule: 2001-to-Present

On April 26, 2001, the NCAA Division I Board of Directors and Management Council *de facto* adopted Proposal 2000-116 effective August 1, 2001,¹⁰⁹ to amend the Restitution Rule, then Bylaw 19.8, which

¹⁰⁶ After restructuring, the citations that follow are to the *NCAA Division I Manual* only, since the exact same Restitution Rule is reprinted on differently numbered pages in the *NCAA Division II & NCAA Division III Manuals*. For a must-read about this reorganization, see W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1 (2000), which describes, among other things, the decreased public information available after the reorganization, and which advocates lesser court deference to the NCAA in favor of actually evaluating whether the NCAA's claimed justifications for its actions really support its historical mission. Professor Carter has noted:

[T]he architects of Restructuring dramatically reduced the public's access to information about the NCAA and member activities. This, in turn, has cut back on the public visibility of decision making that has, in the past, served in some small measure to protect student-athletes when their interests conflicted with those of athletics policymakers.

Id. at 5. As will be seen below, this makes it very hard to find proposed legislation, follow it through the process, and identify when it was adopted and by whom, since finding this information is hit-or-miss on the NCAA's web site, and even its own librarian has not been able to find the legislative history that remains missing herein.

¹⁰⁷ NCAA, 1997-98 NCAA DIVISION I MANUAL 329 (1997).

¹⁰⁸ NCAA, 1999-2000 NCAA DIVISION I MANUAL 337 (1999).

¹⁰⁹ NCAA Division I Board of Director's Minutes, Proposal 2000-116 (Apr. 26, 2001) [hereinafter 2001 Board Minutes], reprinted in Gary T. Brown, *Presidential Groups Tackle Tough Topics at Spring Sessions*, NCAA NEWS, May 7, 2001, http://web1.ncaa.org/web_files/NCAANewsArchive/2001/Division+I/presidential%2bgroups%2btackle%2btough%2btopics%2bat%2bspring%2bsessions%2b-%2b5-7-01.html; see also NCAA Division I Management Council Minutes, Proposal 2000-116 (Apr. 9-10, 2001), reprinted in *Division I Management Council — Legislative Action*, NCAA NEWS ARCHIVE, Apr. 23, 2001, http://web1.ncaa.org/web_files/NCAANewsArchive/2001/Division+I/division%2bi%2bmanagement%2bcouncil%2b—%2blegislative%2b

was promulgated by the NCAA Division I Management Council (Committee on Infractions) as follows:

(i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall return 90 percent of its share of the net receipts from such competition in excess of the regular expense reimbursement, or if said funds have not been distributed, require that they be withheld by the president be assessed a financial penalty as determined by the appropriate divisional Committee on Infractions in that division.¹¹⁰

The source for this Amendment was NCAA Division I Management Council (Committee on Infractions), and the stated intent for Proposal 2000-116 was as follows:

In some instances involving findings of major violations of NCAA legislation, it would be appropriate for the Committee on Infractions to impose financial penalties in the form of fines. Current legislation does not allow for such a penalty upon findings of major violations. Monetary fines, however, may be assessed in secondary violations pursuant to Bylaw 19.6.1-(d). Currently, the only circumstance in which the Committee on Infractions may impose upon an institution a monetary penalty in a major infractions case relates to championship com-

actions%2b-%2b4-23-01.html. *But see* NCAA, 2001-02 NCAA DIVISION I MANUAL 319 (2001). According to these Minutes, however, “[t]he Management Council amended the proposal to remove part C regarding restitution.” 2001 Board Minutes, *supra*. As such, it is unclear how this came to be a *fait accompli*, when it was deleted from the Proposal.

¹¹⁰ See NCAA, *NCAA 2001 Convention Proceeding: Division II*, at Proposal 43, (Business Session, Jan. 8, 2001), <http://web1.ncaa.org/conventionArchive/>; *accord* NCAA, *NCAA 2001 Convention Proceeding: Division III*, at Proposal 60, (Business Session, Jan. 8, 2001), <http://web1.ncaa.org/conventionArchive/>. These are the only publicly available sources as to what would have been presented to the Division I Board of Directors. Because the Restitution Rule is an association-wide rule, assumably, Divisions II & III would not have adopted this revision, if they knew it had been rejected *de jure* by Division I.

petition. The “90 percent rule” permits the Committee on Infractions to recommend to the Championships Committee that an amount not to exceed 90 percent of the institution’s share of revenue distribution in excess of the regular expense reimbursement be withheld in situations in which an ineligible student-athlete participated in championship competition. See Bylaws 19.8-(i) and 31.2.2.5. By way of example, recently, the Division I Championships/Competition Cabinet has experienced some confusion regarding the amount of funds to be withheld, due to such factors as conference revenue sharing policies. Amending the legislation to substitute fines in lieu of the “90 percent rule” would avoid future confusion in all divisions. Allowing the Committee on Infractions to impose reasonable fines, in lieu of the “90 percent rule,” when violations are found in certain major infractions cases will provide an appropriate and viable penalty option that currently exists only for findings of violations in secondary infractions cases.¹¹¹

In 2003 the NCAA renumbered the Restitution Rule back to By-law 19.7, where it has remained to this day.¹¹²

On November 1, 2007, the NCAA Division I Board of Directors amended the Restitution Rule, which was promulgated by the NCAA

¹¹¹ NCAA, *NCAA 2001 Convention Proceedings: Division II*, at Proposal 43 (Jan. 8, 2001). As stated above, Division I does not have the information available publicly, but because the Restitution Rule is an association-wide rule and the problem arose in Division I, presumably, Division I would have the same stated purpose as Division II.

¹¹² NCAA Division I Board of Director’s Minutes, Proposal 03-44 (Apr. 24, 2003), reprinted in Gary T. Brown, *Division I Presidents OK Core-Course Jump*, NCAA NEWS, May 12, 2003, http://web1.ncaa.org/web_files/NCAANewsArchive/2003/Division+I/division%2bi%2bpresidents%2bok%2bcore-course%2bjump%2b-%2b5-12-03.html; see also NCAA, 2003-04 NCAA DIVISION I MANUAL 340-41 (2003); Div. I MANUAL, *supra* note 6, art. 19.7, at 296 (2009). For the text of the Proposal, see NCAA, Management & Presidents Councils’ Proposal 10, reprinted in *Noncontroversial Legislation*, NCAA NEWS, June 23, 2003, http://web1.ncaa.org/web_files/NCAANewsArchive/2003/Membership+Information/noncontroversial%2blegislation%2b-%2b6-23-03.html.

Division I Management Council (Governance Subcommittee),¹¹³ as follows:

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

. . . .

(h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the *Leadership Council* concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program¹¹⁴

¹¹³ NCAA, 2008-09 NCAA DIVISION I MANUAL, art. 19.7, at 302. For confirmation of the reorganization of the Division I governance structure that necessitated these modifications in the Rule, see Michelle Brutlag Hosick, *New Division I Structure Paves Leadership Path*, NCAA NEWS, Nov. 19, 2007, http://web1.ncaa.org/web_files/NCAANewsArchive/2007/Division+I/new%2bdivision%2bi%2bstructure%2bpaves%2bleadership%2bpath%2b-%2b11-19-07%2b-%2bncaa%2bnews.html.

¹¹⁴ NCAA, 2008-09 NCAA DIVISION I MANUAL, art. 19.7(h), at 302 (emphasis in original).

M. NCAA's Current Restitution Rule as of 2010

The current Restitution Rule, Bylaw 19.7, now reads:

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

- (a) Require that individual records and performances achieved during participation by such ineligible student athlete shall be vacated or stricken;
- (b) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
- (c) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
- (d) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
- (e) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
- (f) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;

- (g) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;
- (h) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Board of Directors concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and
- (i) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.¹¹⁵

With the Restitution Rule now well into its fourth decade, one might wonder why all of the attention was paid to the Rule internally at the NCAA when it has only been used once. The answers appear to be as follows: First, the Rule was immediately effective at curtailing members' and college athletes' injunctive claims, and the success of those claims, against the NCAA.¹¹⁶ Second, the Rule was amended and modified to track the language in the NCAA's Penalty Rule, as well as for changes in the manual, and in the organizational structure of the NCAA over time.

¹¹⁵ DIV. I MANUAL, *supra* note 6, art. 19.7, at 296.

¹¹⁶ There is no complete litigation history of the NCAA, but one can read what the NCAA self-reported to its membership regarding lawsuits and litigation costs from 1964 to the present in the *NCAA News Archives*, which is available at http://ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/ncaa+news/ncaa+news+online/news+archive. See also CROWLEY, *supra* note 1, at ch. 5 (discussing courts, Congress, and capitols).

IV. COURT REACTION TO THE RESTITUTION RULE PRIOR TO *OLIVER v. NCAA*

There has been very little attention paid to the Restitution Rule by the courts, which is what one would expect to see if the Rule was effective at its purpose of curtailing members' and college athletes' injunctive claims, and the success of those claims, against the NCAA. However, there is no publicly available data that would tell us how many suits were not brought because of the Rule, or how many suits were brought that were unsuccessful at the trial court level because of the Rule and not appealed further.

The first mention of the Restitution Rule by the Colorado Federal District Court stated it "refers to penalties arising from competition in accordance with the terms of a court restraining order or injunction. Actions subsequent to this Court's temporary restraining order are not here in issue, making this section inapplicable."¹¹⁷

The first use of the Restitution Rule was by the Tenth Circuit Court of Appeals, which used it to prevent the appeal from becoming moot, to wit:

The portion of the district court's opinion granting prospective relief in the form of an injunction has indeed been mooted by [the plaintiff's] graduation. It is our opinion, however, that a substantial controversy still exists between the parties.

[The Restitution Rule] contemplates possible retrospective action against a student-athlete who is ineligible under the terms of the NCAA Constitution, Bylaws or other legislation of the Association but who is permitted to participate in intercollegiate competition under the protection of a court restraining order or injunction operative against the institution of the NCAA. Under this provision the NCAA can in its discretion vacate or strike the individual records and performances of the student-

¹¹⁷ Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 896 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978).

athlete, forfeit victories won by the team upon which the student-athlete played, and require the return of awards.¹¹⁸ For example, the Big Eight Conference, also a defendant in this action, has given notice of its intention to adjust [the plaintiff's] points and vacate any places earned in Big Eight championships should this court find him to have been ineligible to participate. As long as [the plaintiff's] records and awards are at stake, this court can render a decision that will affect the rights of the litigants.¹¹⁹

However, the Tenth Circuit was apparently not informed that the NCAA membership had rejected a proposed amendment in 1986 to have the Restitution Rule apply to cases that were moot.¹²⁰ In addition, the Tenth Circuit was apparently not informed that the NCAA had only enforced this Rule once, so there was no real possibility of any adverse action against the college athlete; therefore, this appeal really was moot.¹²¹

The District Court for Minnesota, in granting the plaintiff's motion for a preliminary injunction, observed this about the Restitution Rule:

The only perceivable harm to the defendant [u]niversity would result from the fact that the [NCAA], of which the defendant [u]niversity is a member, has rules which permit certain sanctions to be leveled upon the defendant [u]niversity should a player be declared ineligible under a court order which is later vacated, stayed, reversed, etc. This rule defines sanctions including the

¹¹⁸ *Wiley v. NCAA*, 612 F.2d 473, 475-76 (10th Cir. 1979), *cert. denied* 446 U.S. 943 (1980). "Other sanctions are authorized by [the Restitution Rule] but are inapplicable here, their impact falling mainly upon the institution which allows an ineligible student-athlete to participate in competition." *Id.* at 476 n.4.

¹¹⁹ *Id.* at 476 (citation omitted).

¹²⁰ NCAA, *Proceedings of the 80th Annual Convention of the NCAA* at 157, A-28 (Jan. 14, 1986).

¹²¹ There is no public or readily available information regarding the history of enforcement of this Rule by the Big Eight, but that is something the court should have considered—rather than just assumed.

vacation of the athlete's records for the period for which the athlete played, the forfeiture of games by the team, the declaration of ineligibility of the team for post-season tournaments, to the return of television receipts for games that the athlete played in. However, in this regard, the defendant [u]niversity's destiny is in its own hands. The [u]niversity does not have to appeal this Order if it is fearful of the sanctions which might be imposed by the NCAA. And the defendant [u]niversity's lawyer is of the opinion that the NCAA could not force an appeal. Therefore, an appeal with all of the usual uncertainties accompanying it is not mandated. It would be the defendant [u]niversity's choice whether it wants to risk these sanctions at this time. Presumably some impartial arbitrator at the defendant [u]niversity will make the decision of whether the defendant [u]niversity will risk these potential sanctions.¹²²

The Maryland Circuit Court for Baltimore City first permanently enjoined the NCAA from enforcing its Restitution Rule, but because there was "[never] . . . more than a short discussion with respect to [the Restitution Rule] being void against public policy,"¹²³ and because the permanent injunction was issued without the court first determining the merits of the claim, which meant the circuit court was limited to issuing an interlocutory injunction under Maryland law, and due to a lot of confusion in the record, the Maryland Court of Appeals vacated the injunction and remanded the case back to the circuit court for further proceedings.¹²⁴ However, there is no reported decision as to what resulted from any such proceedings.

The District Court for Pennsylvania, after denying the plaintiff's motion for a preliminary injunction, took the time to note:

This conclusion renders moot [the university's] application for declaratory and injunctive relief with respect to [the Restitution Rule], which purports to enable the

¹²² Hall v. Univ. of Minn., 530 F. Supp. 104, 109-10 (D. Minn. 1982).

¹²³ NCAA v. Johns Hopkins Univ., 483 A.2d 1272, 1274 (Md. 1984).

¹²⁴ *Id.* at 1273-76.

NCAA to discipline a college for permitting an ineligible player to participate, even pursuant to a grant of an injunction by a court. I do agree with [the university] that the validity of this by-law is dubious indeed, at least in any case in which the NCAA itself was a party to the litigation, and subject to the court's injunctive order. I need not, however, address that issue at this time.¹²⁵

In affirming the district court, the Third Circuit Court of Appeals likewise chose not to address the Restitution Rule.¹²⁶

The Texas District Court for Lubbock County stated:

[T]emporary injunction ordered [the university], its officers and agents, to desist and refrain from taking any actions reinforcing any NCAA rule or bylaw to prevent [the plaintiff] from participating as a member of [the university's] football team until final judgment is rendered. The trial court further enjoined the NCAA from taking any disciplinary or other action adverse to [the university] for its compliance with the court's order, or against [the plaintiff] for exercising the rights granted under the injunction and from any other action which would in any respect circumvent the trial court's order. Specifically, the NCAA was enjoined from involving and enforcing [its Restitution Rule] in the event that the court's temporary restraining order or injunction as to the NCAA's determination of [the plaintiff's] eligibility was subsequently voluntarily vacated, stayed, or reversed, or it is finally determined by the trial court, or any other court, that injunctive relief is not justified.¹²⁷

The Texas Court of Appeals, in dismissing the appeal as moot, noted:

¹²⁵ *Butts v. NCAA*, 600 F. Supp. 73, 76 (E.D. Pa. 1984), *aff'd*, 751 F.2d 609 (3d Cir. 1984).

¹²⁶ *Butts v. NCAA*, 751 F.2d 609, 611 n.1 (3d Cir. 1984).

¹²⁷ *NCAA v. Jones*, 982 S.W.2d 450, 451 (Tex. App. 1998), *rev'd*, 1 S.W.3d 83 (Tex. 1999).

[A]s between [the plaintiff] and the NCAA, the temporary injunctive provisions restraining the NCAA from retaliatory action against either [the plaintiff or the university] under the [R]estitution [R]ule had no further operative effect after the 1996 football season for [the university] concluded because there was no justiciable controversy or pending action between [the plaintiff] and the NCAA or the NCAA and [the university] concerning the validity or enforcement of the [R]estitution [R]ule. In this regard, we also point out that [the university] is not a party to this appeal, and the record before us does not show any pending cause of action between the NCAA and [the university] concerning the validity or enforcement of the [R]estitution [R]ule.

Consequently, under the present circumstances, the issue as to whether the [R]estitution [R]ule is enforceable and valid is . . . “hypothetical, ‘iffy’ and contingent.” Accordingly, we conclude that any opinion by this court concerning the rule’s enforceability or validity would be purely advisory and beyond our well-defined jurisdiction.¹²⁸

The Texas Supreme Court reversed the Court of Appeals on the mootness issue, because it concluded there was still a live controversy between the parties as it related to the Restitution Rule, and the court remanded the case back to the Court of Appeals to determine the merits of the appeal.¹²⁹ However, the parties then settled their dispute, and the appeal was again dismissed at the request of the NCAA.¹³⁰

¹²⁸ *Id.* at 452 (citation omitted).

¹²⁹ *NCAA v. Jones*, 1 S.W.3d 83, 84-88 (Tex. 1999); *see also NCAA v. Yeo*, 171 S.W.3d 863, 867 nn.12-13 (Tex. 2005). *Jones* was a five-to-four decision, and as the dissent pointed out, this was essentially a straw man appeal since the university was not a party to the appeal, and the plaintiff had refused to mount a defense on appeal, because he apparently no longer cared. *Jones*, 1 S.W.3d at 84, 88, 90 (Abbott, J., dissenting).

¹³⁰ *NCAA v. Jones*, No. 07-96-0424-CV, 1999 WL 1103453, at *1 (Tex. App. Nov. 30, 1999).

Just like the Tenth Circuit, the Texas Supreme Court was apparently not informed that the NCAA membership had rejected a proposed amendment in 1986 to have the Restitution Rule apply to cases that were moot. In addition, the Texas Supreme Court was also apparently not informed that the NCAA has only enforced this Rule once, so there was no real possibility of any adverse action against the college athlete.¹³¹

The Jefferson County, Kentucky, Circuit Court

[F]ound that [the plaintiff] would suffer substantial collateral consequences from an erroneous and adverse eligibility determination, balanced the equities in favor of [the plaintiff], and ordered “the NCAA and its members . . . to immediately restore the intercollegiate eligibility of [the plaintiff] so as to allow him to participate in all NCAA basketball contests.” The trial court also addressed [the university’s] concern that the NCAA could impose sanctions under [the Restitution Rule] if the injunction was subsequently vacated. [The Restitution Rule] allows the NCAA to seek restitution from member institutions who permit student-athletes found ineligible by the NCAA to compete for their athletic teams pursuant to court orders which are later vacated. The trial court therefore “declare[d] that [the Restitution Rule] is invalid because it prevents parties from availing themselves of the protections of the courts” and ordered: . . . that the [u]niversity . . . shall abide by this injunction and shall not prohibit [the plaintiff] from engaging in intercollegiate basketball; . . . and its members are hereby ordered to take no action to prevent or interfere with the [u]niversity[’s] ability to abide by this Order by attempting to enforce [the Restitution Rule].¹³²

¹³¹ See generally Alan Wright et al., *Appellate Practice and Procedure*, 53 SMU L. REV. 617, 655-56 nn.299-302 (2000) (discussing moot appeals and the liberal construction of the *Jones* facts to save the NCAA’s appeal).

¹³² NCAA v. Lasege, 53 S.W.3d 77, 82 (Ky. 2001) (footnote omitted).

The Kentucky Court of Appeals denied the NCAA's motion for interlocutory relief,¹³³ so it:

[D]id not address the merits of that portion of the temporary injunction which prohibited the NCAA from seeking restitution under [the Restitution Rule] because “[a]pplication of the bylaw becomes an issue in this case only in the event that the injunction were to be set aside or a permanent injunction were denied in this matter.”¹³⁴

The Kentucky Supreme Court vacated the temporary injunction, and in regards to the Restitution Rule, it explained that:

The circuit court's temporary injunction order read as follows regarding the Restitution Rule:

After considering the evidence presented and the equities involved, the [c]ourt finds that the action of the NCAA was arbitrary and capricious and that [the plaintiff] will and has suffered irreparable harm and therefore grants the request of [the plaintiff] and orders the NCAA to permit [him] to play basketball at the college of his choice This [c]ourt further finds that [the Restitution Rule] is contrary to public policy, is a contract of adhesion, denies equal protection under the law, and that the member schools of the NCAA deny themselves due process of law by adherence to this agreement.

. . . .
The [c]ourt also understands that [the university] fears that [the Restitution Rule] could be enforced against it. That bylaw permits sanctions to be imposed by the NCAA against member schools if the [c]ourt order should be set aside or reversed in some manner. This [c]ourt has never seen such an agreement between members of an association that allows sanctions for turning to the courts for assistance when a perceived wrongdoing exists. . . . The judicial power of this Commonwealth cannot be thwarted by members of an association such as the NCAA. . . . Consequently, this court declares that the [the Restitution Rule] is invalid because it prevents parties from availing themselves of the protections of the courts.

Lasege v. Bellarmine Univ., No. 00-CI-07609, 2000 WL 35549169 (Ky. Cir. Ct. Dec. 20, 2000) (no Westlaw pagination available), *vacated sub nom.* NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001) (citations omitted). The University of Louisville apparently did not want to be involved in this lawsuit, so Bellarmine University was sued along with the NCAA as its representative, as required under Kentucky law. *See id.* Later, the University of Louisville intervened as a defendant and took the side of the NCAA. Bellarmine was never anything beyond a nominal defendant. *Id.*

¹³³ *Lasege*, 53 S.W.3d at 82.

¹³⁴ *Id.*

By becoming a member of the NCAA, a voluntary athletic association, [the university] agreed to abide by its rules and regulations. [The Restitution Rule] is one of those regulations, and it specifically provides that the NCAA can attempt to restore competitive equity by redistributing wins and losses and imposing sanctions upon a member institution which allows an ineligible player to participate under a subsequently-vacated court order, even if that order *requires* the institution to allow the player to participate

. . . .

In fact, contrary to the belief of the trial court the concept of “risk-free” injunctive relief is unheard of— [the Temporary Injunction Rule] requires the party in whose favor the injunction is granted to post a bond and wrongfully enjoined parties may recover compensatory damages. Here, [the university] and the other NCAA members reached an agreement as to how competitive equity should be restored in the event of an erroneous court determination regarding a player’s eligibility, and the trial court simply released [the university] from that obligation.

The trial court’s belief that the NCAA’s Restitution Rule “thwarts the judicial power” is simply without foundation. [The Restitution Rule], like the Restitution Rules enforced by many state high school athletic associations “does not purport to authorize interference with any court order during the time it remains in effect, but only authorizes restitutive penalties when a temporary restraining order is ultimately dissolved and the challenged eligibility rule remains undisturbed in force.” The authority of the courts is thus in no way compromised, and [the Restitution Rule] merely allows for post-hoc equalization when a trial court’s erroneously granted temporary injunction upsets competitive balance. If the trial court’s preliminary conclusions carry the day, and a

student-athlete's eligibility is confirmed by final determination, no restitutionary remedy is warranted or appropriate, and [the Restitution Rule] provides for none.

The trial court's curt conclusion that [the Restitution Rule] "prevents parties from availing themselves of the protections of the courts" does not disclose the basis for this opinion. Perhaps the trial court believed that [the Restitution Rule] would deter aggrieved student-athletes from seeking judicial redress because of fears that their efforts would only hurt their teams in the long-run. Perhaps the trial court believed that the bylaw created a disincentive for NCAA member institutions to allow players whose eligibility has not yet been finally adjudicated to play in games or other athletic events. Neither conclusion would justify the trial court's order. The decision to seek injunctive relief will always involve a calculated risk on the part of the plaintiff, and those with meritorious claims will decide to proceed. Rather than changing the rules in the middle of the game, trial courts should consider the possibility that an erroneous decision could result in restitutionary sanctions against a student-athlete's institution when they balance the equities.¹³⁵

¹³⁵ *Id.* at 87-89 (footnotes omitted). *Lasege* was a four-to-three decision, and as the dissent stated in regards to the Restitution Rule:

I believe that one could reasonably conclude from a reading of this provision that it applies only during the period of the injunctive relief. Regardless, the majority opinion overrules *Kentucky High School Athletic Association v. Hopkins County Board of Education*, Ky. App., 552 S.W.2d 685 (1997), and then rules that injunctive relief prohibiting a voluntary athletic association from seeking agreed-upon restitutionary sanctions is inappropriate. Such action, in my opinion, is unwarranted and premature.

The primary fallacy of the majority's opinion revolves around its proposition that cases involving voluntary athletic associations are more troubling than all other cases involving injunctive relief. While they may "pose special difficulties," most cases seeking injunctive relief are "invariably time sensitive" that place trial judges in the position of having to "make significant decisions with less-than-complete information." It is easy to conclude in this case, as did the trial judge, that the NCAA's ruling did not have evidentiary support. The trial court was presented with substantial

How would the Kentucky Supreme Court have ruled if the NCAA had disclosed that the Restitution Rule's sole purpose was to "authorize interference with [a] court order during the time it remains in effect[?]"¹³⁶ Furthermore, if the Kentucky Supreme Court accepted that reality, would it have still allowed the NCAA and its members to contract away college athletes' rights of access to the courts? Why did the court not consider that the Rule provides no remedy, when the NCAA mistakenly finds a college athlete ineligible? In addition, does the court really believe that a disincentive to follow valid court orders comports with the public policy of the Commonwealth of Kentucky? The lack of

evidence to conclude that the complaint raised a substantial question, that the NCAA treated [the plaintiff] differently from other athletes, that the NCAA failed to appropriately consider mitigating evidence, and that the arbitrary actions of the NCAA posed a risk of irreparable injury to the plaintiff.

Today, the majority charts new ground for cases involving voluntary athletic associations like the NCAA. Longstanding precedent regarding the propriety of injunctive relief is ignored and a special class is produced by this holding. I would deny the relief requested and return this case for further proceedings to the trial court where it belongs.

Id. at 91-92 (Johnstone, J., dissenting). See Kelly P. O'Neill, *Sioux Unhappy: Challenging the NCAA's Ban on Native American Imagery*, 42 TULSA L. REV. 171, 189-93 (2006) (discussing *Lasege* and arbitrary and capricious allegations against the NCAA).

¹³⁶ *Lasege*, 53 S.W.3d at 88 (quoting *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n*, 467 N.W.2d 21, 24 (Mich. 1991)). The *Kentucky Rules of Professional Conduct* were adopted effective January 1, 1990, and thus were applicable to the NCAA's brief. KY. LEGAL ETHICS § 0.01:101 (American Legal Ethics Library), available at http://www.law.cornell.edu/ethics/ky/narr/KY_NARR_0.html. Under the *Kentucky Rules of Professional Conduct*, the NCAA had a duty of candor to the Kentucky Supreme Court. KY. R. PROF'L CONDUCT R. 3.3 (2009). See also KY. LEGAL ETHICS §§ 3.3:100-:800 (American Legal Ethics Library), available at http://www.law.cornell.edu/ethics/ky/narr/KY_NARR_3.html#3.3 (discussing the duty of candor toward the tribunal under the *Kentucky Rules of Professional Conduct*).

For a discussion of whether the duty of candor gives rise to a Rule 11 violation, please see GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES* § 5.03[c] (Richard G. Johnson ed., 3d ed. 2004) (discussing the relationship between the reasonable inquiry requirement and the "warranted by fact or law" clauses); see also Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOYOLA L.A. L. REV. 819, 910-17 (2004) (discussing the consequences of having separated the litigation ethics rules from Civil Rule 11 and arguing the litigation ethics rules should become the Civil Rule 11 standard).

analysis and reasoning here is astonishing, as is the Kentucky Supreme Court's apparent disregard for the trial court's findings of fact and conclusions of law, which were damning of the NCAA,¹³⁷ yet very similar to what I saw in the *Oliver* case.

¹³⁷ Based on my experience in the *Oliver* case, the trial court's findings give a very accurate picture of how the NCAA student-athlete reinstatement process works or does not work and is universally arbitrary and capricious:

This court heard testimony from several witnesses including Mr. Lasege. The most essential witness for the defense, Julie Ann Roe ("Ms. Roe"), Director of the Reinstatement Committee, testified in no uncertain terms that Mr. Lasege had violated the rules of eligibility for participation in basketball for an NCAA Division I team. In her testimony she explained procedure used by the staff of the Reinstatement Committee. The initial investigation was conducted by Laura Wurtz, ("Ms. Wurtz"), whose affidavit was presented to the court. In her capacity as liaison to the Student Athlete Reinstatement Subcommittee, Ms. Wurtz reviewed the documents presented by U of L which had asked for Mr. Lasege's reinstatement after it discovered possible violations of the eligibility rules. As the primary investigator, she states that she conducted an interview with Mr. Lasege, reviewed the case precedent, and made the staff determination that reinstatement was inappropriate. Ms. Wurtz is extremely well qualified, the recipient of a juris doctorate from Creighton University, but lacks experience in this type of investigation. [FN2: Ms. Wurtz only joined the NCAA staff as liaison in June, 1999.] Her affidavit supporting the NCAA's position is replete with conclusions and lacks a basic understanding of Mr. Lasege's circumstances.

Ms. Roe, who advocated the position of the NCAA during the appeals process, is both extremely articulate and knowledgeable of the various NCAA bylaws regarding rules infractions. Ms. Roe is a first year law student and has been Director of the Student Reinstatement Subcommittee since June of 1999. Ms. Rowe has been with the NCAA since the fall of 1997. Both Ms. Roe and Ms. Wurtz indicated that they rely on case precedent and both testified that they have never known of multiple violations of the rules which led to the staffs recommendation of denial of reinstatement. They state that these violations consisted of contract and compensation rules (12.2.5.1), agent rules (12.3.1) and preferential treatment, benefits and services rules (12.1.1.1.6). Thus their conclusion and the staff that Mr. Lasege not be permitted reinstatement. The appeals process accepted their recommendations after considering arguments from Ms. Roe, testimony from Mr. Lasege, and arguments from U of L representatives. Under normal circumstances, this [c]ourt would agree that this case is a "slam dunk" for the Reinstatement Subcommittee because the evidence is undeniable and uncontroverted. There are, however, overwhelming

and mitigating circumstances that prevent this [c]ourt from allowing such an injustice to occur. The court believes it is necessary to recount the history of Mr. Lasege's travels and to place them in the proper perspective just as the Reinstatement Subcommittee and the Appeals Committee should have done, yet failed to do.

. . . .

Given Ms. Wurtz's affidavit, it is obvious to this [c]ourt that that none of the athletes indicated in Mr. Lasege's response met the same hurdles or obstacles that faced Mr. Lasege. In a like manner, the case precedent cited by Ms. Wurtz and Ms. Roe did not come remotely close to the facts of Mr. Lasege's situation. This [c]ourt believes that there would never be a factual circumstance that would fit neatly into the pattern the NCAA believes is necessary.

As pointed out by Ms. Roe, the fundamental policy of the NCAA is to "retain a clear line of demarcation between intercollegiate athletics and professional sports." (NCAA Manual 1.3.1) The NCAA, however, has by its very own interpretation caused a subjective analysis to be made by persons (in this case) who lack the training and expertise to differentiate between various case precedents. The discretion given by this committee to these persons is arbitrary and capricious, and while there is a discussion of case precedent, there is no clear "demarcation" as provided by their own by-laws. When our courts discuss case precedent, they rely upon the rule of law; thus what is applicable in one case is followed in another. In sharp contrast, when the NCAA speaks of case precedent, it discusses the facts and then deviates from the definition of the "demarcation" line to be followed. Thus, NCAA member schools have no point of reference. For instance, if the rule is a student athlete should not sign a contract, then that should be final and not subject to discretion. Once there is a deviation from this standard then a party should be ineligible, period, no further discussion.

But because the NCAA has permitted discretion on eligibility requirements to the Reinstatement Committee, too much reliance has been places [sic] upon the thought processes of the investigator. The NCAA News and Features included the following: "If a student-athlete exhibits a clear intent to professionalize — for example signing a professional contract — the (sub) committees agreed that that individual may not warrant reinstatement. However, in cases where there is uncertainty about the student athlete's intent" Therefore, this [c]ourt has no trouble in stating that this deviation from a standard on a case by case basis prevents the fundamental concept of due process, and in this case, denies Mr. Lasege the right to continue with his education.

Lasege v. Bellarmine Univ., No. 00-CI-07609, 2000 WL 35549169 (Ky. Cir. Ct. Dec. 20, 2000) (no Westlaw pagination available), *vacated sub nom.* NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001) (citations omitted).

The Supreme Court of West Virginia, in vacating a preliminary injunction, had this to say about the Restitution Rule: “Given the relatively nominal harm, if any, to the parties resulting from this erroneous ruling, however, we strongly object to any reprisal or adverse action contemplated by the appellants as a result of our decision herein.”¹³⁸

Finally, the Colorado Court of Appeals, in affirming the trial court’s denial of a preliminary injunction, had this to say about the Restitution Rule: “Consequently, we do not address the parties’ remaining arguments, including the validity of the NCAA’s [R]estitution [R]ule . . . on the trial court’s ability to fashion a remedy for [the plaintiff] in this case.”¹³⁹ This was too bad because:

This [R]ule present[ed] a couple of problems for [the plaintiff]. Because an athlete’s collegiate career is relatively short, giving him only a brief window of time to seek redress of his claims in court, an injunction against the NCAA or the relevant school may be his only effective remedy. However, the Restitution Rule may

¹³⁸ Hart v. NCAA, 550 S.E.2d 79, 86 (W.Va. 2001).

¹³⁹ Bloom v. NCAA, 93 P.3d 621, 628 (Colo. App. 2004). The trial court had premised its denial in part on the effect the Restitution Rule could have on the university without any discussion of the propriety of the Rule, itself. Bloom v. NCAA, No. 02-CV-1249, slip. op. at 8 (Colo. Dist. Ct. Aug. 15, 2002), *aff’d*, 93 P.3d 621, 628 (Colo. App. 2004). After the appellate oral argument, Wally Renfro, the then senior advisor to the NCAA President, stated, “the restitution rule is necessary to prevent universities from seeking injunctions against the NCAA just so an athlete could play while a case progresses through the courts.” *WR/Skier Still Fighting Endorsement Ban*, ESPN.COM, Apr. 7, 2004, <http://sports.espn.go.com/nca/news/story?id=1777821>. For a broader discussion of the *Bloom* case and its implications, see Lisa K. Levine, *Jeremy Bloom v. National Collegiate Athletic Association and the University of Colorado: All Sports Are Created Equal; Some Are Just More Equal than Others*, 56 CASE W. RES. L. REV. 721 (2006); see also Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An Elite Athlete’s Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687 (2006); Christian Dennie, *Amateurism Stifles a Student-Athlete’s Dream*, 12 SPORTS LAW. J. 221 (2005); Alain Lapter, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255 (2005); Joel Eckert, Note, *Student-Athlete Contract Rights In the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905 (2006); Gordon E. Gouveia, Note, *Making a Mountain Out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22 (2003).

render an athlete's injunction meaningless because it allows the NCAA to serve its own "cross-injunction" on the member school. Member schools may be reluctant to adhere to the terms of an injunction obtained by the player and may still refuse to allow the athlete to participate, because the possible sanctions under the Restitution Rule are so severe. Consequently, as [the plaintiff's] case illustrated, member schools can be coerced into siding with the NCAA during injunction hearings. Furthermore, courts seem reluctant to issue these injunctions at all for fear that a successful appeal by the NCAA would lead to crippling consequences for the member school. [The trial court's] decision in [here] suggests as much.¹⁴⁰

Moreover:

The [trial] court's denial of an injunction was due in large part to the Restitution Rule and the potential sanctions that [the university] could face were an injunction to be overturned. Imposing sanctions on an institution which complies with a court order violates public policy; accordingly . . . the Restitution Rule, should be struck down.

Prior to handing down his ruling on [the plaintiff's] request for an injunction, [the trial court] ordered [the university] to take sides because of "internally conflicting interests." Therefore, [the university] entered an appearance and aligned itself with the NCAA as an involuntary defendant. As a result, the [trial] court denied an injunction on the grounds that notwithstanding the probability of success on the merits, the possibility that an injunction would be overturned and the institution would face sanctions was sufficient to find that the public interest and balance of the equities did not favor [the

¹⁴⁰ Lapter, *supra* note 139, at 268-69 (footnotes omitted); *accord* Gouveia, *supra* note 139, at 24 (stating the Restitution Rule "discourages institutions from adhering to injunctions against the NCAA, and, as [the plaintiff's] case has revealed, may discourage courts from issuing injunctions against an institution at all").

plaintiff]. Where a member institution is joined as a defendant and compelled to adhere to an injunction, the Restitution Rule exposes member institutions to the risk of sanctions for complying with a court order. Such a rule violates public policy because it punishes a party that complies with a court order. Furthermore, where a court denies a student-athlete an injunction due to the harsh consequences of the Restitution Rule it denies the right to a judicial remedy in violation of public policy. Accordingly, courts should enjoin the NCAA from imposing sanctions under such circumstances.¹⁴¹

In summary, only two states before Ohio have heard a challenge to the Restitution Rule, neither of which heard the challenge on the merits, but instead heard these challenges in the context of interlocutory, preliminary, or temporary injunctions. Maryland found against the Rule, but subsequent proceedings vacated and remanded the decision into oblivion.¹⁴² Kentucky found in favor of the Rule in a poorly reasoned split decision.¹⁴³ The other decisions, previously discussed herein, indicate either indignation at the Rule, even if it was not at issue; the power the Rule has to prevent an injunction from issuing; or the power of the Rule to allow review of otherwise moot injunctions, where the NCAA wins by attrition. However, this sample size is so small that these observations are anecdotal.

Why are there so few cases challenging the Restitution Rule? In addition to the effectiveness of the Restitution Rule discussed above, very few college athletes have viable injunctive claims to begin with. Those with viable claims will have limited access to attorneys and little resources to employ one, so unless the issue involves a *star* college athlete with measurable market value, or an attorney is willing to represent the athlete pro bono,¹⁴⁴ these few cases are never even filed.

¹⁴¹ Gouveia, *supra* note 139, at 27-28 (footnotes omitted).

¹⁴² See *NCAA v. Johns Hopkins Univ.*, 483 A.2d 1272, 1276 (Md. 1984).

¹⁴³ See *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001).

¹⁴⁴ This actually happened in the Kentucky case with a very prominent Louisville attorney, James E. Milliman, Esq. See generally *Lasege v. Bellarmine Univ.*, No. 00-CI-07609, 2002 WL 34216076 (Ky. Cir. Ct. Feb. 7, 2002) (no Westlaw pagination available) (identifying the attorneys representing the plaintiff).

For those that file their case, it is a very expensive and time consuming battle. The athlete's attorney often will not have handled this type of case before;¹⁴⁵ and the NCAA will bring in its regular teams of lawyers, rows deep, to make it so unpleasant for the athlete, his or her attorneys, and the court, that no one will want to go through the experience again. As a tax-exempt, nonprofit charitable organization, one would think it outrageous that the NCAA presumably spends tens of millions of dollars per year on legal fees to fight college athletes, whose welfare constitutes its charitable purpose.¹⁴⁶

As a postscript, the NCAA did not invoke the Restitution Rule in any of these cases discussed in this section, nor did it do so in the *Oliver* case, after we reached a settlement that resulted in a vacated judgment and a dismissal of the case.

V. COURT REACTION TO SIMILAR STATE HIGH SCHOOL ATHLETIC ASSOCIATION RESTITUTION RULES

Courts have paid somewhat more attention to similar state high school athletic association restitution rules. This is what one would expect to see, if the toned-down high school versions of the Restitution Rule were less effective at their purpose of curtailing high schools' or their athletes' injunctive claims, and the success of those claims, against the state high school athletic associations. However, there is no publicly available data that would tell how many suits were not brought because of these rules, or how many suits were brought that were unsuccessful at the trial court level because of these rules and not appealed further.

The Kentucky Court of Appeals first addressed this issue when, in reversing in part a permanent injunction against the Kentucky State

¹⁴⁵ For instance, in the West Virginia case, the plaintiff was represented by his brother, David S. Hart, Esq., a then newly-minted attorney. I had never handled a sports case before, but then the *Oliver* case was not a sports case in the traditional sense, because it was really a right-to-counsel and interference-with-the-judiciary case, where my expertise in legal ethics and professional responsibility issues trumped the NCAA's lawyer brigade.

¹⁴⁶ See National Collegiate Athletic Association, 2006 IRS Form 990, line 32 (on file with author).

High School Athletic Association, it upheld the permanent injunction against the association's Restitution Rule, as follows:

In one respect, the judgment of the circuit court must be affirmed. The circuit court properly enjoined the [a]ssociation from imposing sanctions against the [s]chool for playing [the plaintiff] in compliance with the orders of the court. Even though the temporary injunction was improperly granted, it was the duty of the [s]chool to comply with the temporary injunction until it was dissolved. There is no question of collusion. For a time, the [a]ssociation was represented by the same attorney as represented the [s]chool and the [b]oard.

The judgment of the circuit court is reversed except for that portion of the judgment enjoining the [a]ssociation from imposing sanctions against the [s]chool for playing [the plaintiff] in conformity with the temporary injunction.¹⁴⁷

The Supreme Court of North Dakota next addressed this issue, when, in reversing a restraining order against the North Dakota High School Athletic Association, it stated:

We also find it necessary to state that the [a]ssociation should not impose any sanctions or otherwise penalize [the] [h]igh [s]chool for the past activity, as suggested in the [a]ssociation's brief, because, as the record reflects, the school acted pursuant to a court order. It would be unjust to penalize or sanction the high school for complying with a court order, particularly where the high school was not a party to the proceedings and was not in a position to take appropriate action to either modify or set aside any judicial order.¹⁴⁸

¹⁴⁷ Ky. High Sch. Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685, 690 (Ky. Ct. App. 1977) (citation omitted), *overruled by* NCAA v. Lasege, 53 S.W.3d 77, 89 (Ky. 2001).

¹⁴⁸ Crandall v. N.D. High Sch. Activities Ass'n, 261 N.W.2d 921, 927 (N.D. 1978).

The Michigan Court of Appeals had repeatedly held in several unpublished opinions that the Michigan High School Athletic Association's restitution rule was invalid,¹⁴⁹ yet the association would not give up, and thus the court stated in a published opinion:

In this case, [the association] again seeks to use its sanction rule to circumvent a valid court order. Such an application would, in effect, punish the student and the school for exercising their right of access to the judicial system and would render meaningless the circuit court's temporary restraining order.

This is not, as [the association] implies, merely a question of whether the [association's] sanction rule is "fair." Rather, the issue here is whether the courts or the [association] represent the higher authority when application of an [association] rule is contested. Indeed, as defense counsel informed us at oral arguments, many schools are now unwilling to depend upon court orders such as we have here because the schools fear [association] penalties once the order is lifted. We find no authority, and defendant cites none, authorizing the [association] to review and overrule the decisions and orders of our courts.

Accordingly, we hold that [the association's restitution rule], is arbitrary, unreasonable and unlawful. The punitive rule evidences a manifest abuse of discretion, as its obvious intent is to chill any challenges to the [the association's] regulations.¹⁵⁰

The District Court for Tennessee, in enjoining the Tennessee Secondary School Athletic Association's restitution rule, noted the association intended to punish the high school for following a valid court

¹⁴⁹ See *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n*, 445 N.W.2d 483, 485 (Mich. Ct. App. 1989), *rev'd and vacated*, 467 N.W.2d 21, 25 (Mich. 1991). The court analyzed several court opinions in which a "defendant is precluded from issuing sanctions against students or schools for their permissive participation in athletic events pursuant to a court order." *Id.*

¹⁵⁰ *Id.* at 486.

order, and stated, “[t]he public interest lies in preventing retaliation against organizations or persons for following valid court orders.”¹⁵¹

The Michigan Supreme Court reversed the long-standing line of precedent against the Michigan High School Athletic Association’s restitution rule, and without discussing any of that precedent, the court stated:

[W]e find [the association’s restitution rule] to be a valid restitutive provision. It is reasonably designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes under the protection of a temporary restraining order, pending the outcome of an ultimately unsuccessful legal challenge to one or more eligibility rules. We find relevant to our decision the fact that [the] rule . . . does not purport to authorize interference with any court order during the time it remains in effect, but only authorizes restitutive penalties when a temporary restraining order is ultimately dissolved and the challenged eligibility rule remains undisturbed in force. We also find relevant the fact that the member schools of the [association] have voluntarily agreed to submit to the [association’s] regulations, including [its Restitution Rule], as a condition of their membership. Furthermore, compliance with [association] rules on the part of student athletes is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the [association].

We recognize that the facts of this particular case are highly sympathetic to [the plaintiffs]. This is not the case of a school seeking to field an ineligible “star” athlete under cover of a temporary restraining order ob-

¹⁵¹ Crocker v. Tenn. Secondary Sch. Athletic Ass’n, 735 F. Supp. 753, 762 (M.D. Tenn. 1990), *aff’d*, 908 F.2d 972, Nos. 89-6450, 89-6451, 1990 WL 104036, at *4 (6th Cir. July 25, 1990) (“It would be unfair to penalize [the] [h]igh [s]chool for actions that it took in compliance with a [d]istrict [c]ourt order during the pendency of that order.”).

tained pursuant to a bad-faith tactical lawsuit. There is no dispute regarding the good faith and sincerity of [the plaintiff], his parents, his counselors, and the school. The young man's desire to participate in interscholastic athletics is both understandable and commendable, and we do not necessarily approve of the [the association's] refusal to grant a waiver in this case. We also recognize, however, that rules of this sort must be drafted and designed to apply to a broad range of cases. Just as the [association] may have valid reasons for declining to permit case-by-case exceptions to its uniform age-eligibility rule, we find that the interests of uniformity and predictability justify evenhanded application of [the Restitution Rule] in this case. In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, we find [the Restitution Rule] to be a valid regulation which neither infringes the authority of the courts nor improperly restricts access to the judicial system.¹⁵²

This lack of analysis echoed the position of the NCAA, which filed an amicus curiae brief stating:

The Michigan High School Athletic Association has promulgated . . . a restitution rule commensurate to [the NCAA's Restitution Rule]. The [association], along with eleven other state high school associations across the United States which have enacted similar legislation, affirmatively support the proposition that member schools are entitled to restitution when an otherwise ineligible player participates in a interscholastic athletic event under permission of a [c]ourt [o]rder which is later vacated or set aside.

The Michigan Court of Appeals has construed the restitution provision as a "penalty" or "sanction" for abiding by a [c]ourt order and has affirmed the action of the [c]ircuit [c]ourt, which enjoined the [the association] from taking action under the [association's] restitution

¹⁵² *Cardinal Mooney High Sch.*, 467 N.W.2d at 23-25 (footnotes omitted).

provision because it was not “fair.” The decision of the Michigan Court of Appeals effectively strikes down the above-mentioned restitution provision of the school districts of the State of Michigan which are charged with the governance of interscholastic athletic activities in Michigan.

If the Michigan Supreme Court affirms the court’s right to enjoin the [association] from taking restitutionary actions on member schools, this decision would have manifold effects on the status of student athletes in other member high schools, colleges and universities in Michigan and elsewhere across the country. A ruling of this sort would detrimentally affect the continued maintenance by the NCAA of its fundamental policy of promoting competitive equity among institutions and the prevention of exploitation of student athletes.

Membership in the NCAA, like membership in the [association], is a voluntary endeavor, by which the members, by joining the organizations, agree to follow certain conditions and obligations of membership. One obligation of membership is the agreement by member institutions to abide by the eligibility rules, in which the eligibility of all students is determined by uniform standards. The NCAA contends that if these uniform standards are not upheld, the entire eligibility rule system at both the high school level and the college level would be rendered meaningless. If the trial [c]ourt’s ruling is allowed to stand, such a ruling would be cited as precedent against the NCAA’s restitution provision which has been operating in all 50 states for over 14 years.¹⁵³

The Michigan Supreme Court did not bother to address the fundamental issue in the case that the court of appeals addressed at oral argument, which was the association’s admission that “many schools

¹⁵³ Brief of Amicus Curiae NCAA, *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass’n*, 467 N.W.2d 21 (Mich. 2007) (No. 87010), available at 1990 WL 10093908 at *4-5.

are now unwilling to depend upon court orders such as we have here because the schools fear [association] penalties once the order is lifted.”¹⁵⁴ Apparently, the NCAA’s argument carried the day, but what would have happened if the NCAA had come clean in its brief on the history and purpose of its Restitution Rule?¹⁵⁵

The Indiana Court of Appeals, in enjoining its state high school athletic association’s restitution rule, in an action brought by a student, stated, “[i]t would be illogical and manifestly unreasonable to exact penalties upon individuals and schools as punishment or retribution for their actions in compliance with a court order.”¹⁵⁶

However, only six months later, in reliance on nothing more than the Michigan Supreme Court’s *analysis*, another panel of the Indiana Court of Appeals upheld the same restitution rule in an action brought by a high school:¹⁵⁷

As was the case with the [Michigan Association], the [Indiana Association] is a voluntary association and members schools agree as a condition of membership to abide by [its] rules. [Association] member schools and

¹⁵⁴ *Cardinal Mooney High Sch.*, 445 N.W.2d at 486.

¹⁵⁵ The *Michigan Rules of Professional Conduct* were adopted effective October 1, 1988, and thus were applicable to the NCAA’s amicus curiae brief. See MICH. LEGAL ETHICS § 0.01:101 (American Legal Ethics Library), available at http://www.law.cornell.edu/ethics/mi/narr/MI_NARR_0.HTM. Under these rules, the NCAA had a duty of candor to the Michigan Supreme Court. MICH. R. PROF’L CONDUCT R. 3.3; see also MICH. LEGAL ETHICS §§ 3.3:100-:800 (American Legal Ethics Library), available at http://www.law.cornell.edu/ethics/mi/narr/MI_NARR_3.HTM#3.3. For a discussion of whether the duty of candor gives rise to a Rule 11 violation, please see VAIRO, *supra* note 136, § 5.03[c] (discussing the relationship between the reasonable inquiry requirement and the “warranted by fact or law” clauses); see also Johnson, *supra* note 136, at 910-17 (discussing the consequences of having separated the litigation ethics rules from Civil Rule 11 and arguing the litigation ethics rules should become the Civil Rule 11 standard).

¹⁵⁶ *Ind. High Sch. Athletic Ass’n v. Avant*, 650 N.E.2d 1164, 1171 (Ind. Ct. App. 1995); accord *Ind. High Sch. Athletic Ass’n v. Carlberg ex rel. Carlberg*, 661 N.E.2d 833, 833 (Ind. Ct. App. 1996) (affirming injunction of Restitution Rule), *vacated and rev’d*, 694 N.E.2d 222, 243 (Ind. 1997).

¹⁵⁷ *Ind. High Sch. Athletic Ass’n v. Reyes*, 659 N.E.2d 158, 169-71 (Ind. Ct. App. 1995) (discussing *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass’n*, 467 N.W.2d 21), *aff’d*, 694 N.E.2d 249 (Ind. 1997).

their athletes must meet eligibility requirements in order to compete and members schools have agreed that participation by an ineligible student, whatever the reason, requires that the offending school forfeit the contest to the opponent and forfeit any awards or monetary proceeds resulting from the tainted participation. While application of the rule may seem harsh in some circumstances, when viewed from the perspective of schools that lost games, tournaments, or championships because of losses against teams that were using ineligible players, the rule is both just and fair. Similarly, a player who won awards or honors for competing while ineligible cannot complain of unfair treatment when asked to return such awards. Finally, without a mechanism such as the Restitution Rule, there would appear to be no deterrent to schools or players seeking injunctions from unfavorable eligibility determinations at such a time that the merits of the case may not be decided until after the relevant season is finished. The trial court erred in prohibiting the [association] from enforcing the Restitution Rule in this case, should it choose to do so.¹⁵⁸

In an opinion that can only be described as an implicit invitation for the NCAA to choose Indianapolis as its new headquarters,¹⁵⁹ the Indiana Supreme Court disapproved the former and affirmed the latter court of appeals' decisions in language so deferential to unincorporated associations that it is hard to mistake:¹⁶⁰

¹⁵⁸ *Id.* at 170-71 (footnote omitted). *But cf.* Diane Heckman, *Athletic Associations and Disabled Student-Athletes in the 1990's*, 143 W. EDUC. L. REP., May 25, 2000, at 1, 30 ("Surprisingly, the Indiana Supreme Court also found that the restitution rule, whereby the [association] could impose sanctions against the school for complying with the lower court order, did not run afoul of the court's authority.").

¹⁵⁹ See generally Maureen Dobie, *Final Four: Indianapolis Competes with Dallas, Denver and Kansas City for the NCAA's New Headquarters*, IND. BUS. MAG., Mar. 1, 1997, at 9, available at <http://www.allbusiness.com/north-america/united-states-indiana/613342-1.html> (discussing the intense competition between states to have the NCAA locate its corporate headquarters in a city within their borders due to the enormous financial benefits surrounding the choice).

¹⁶⁰ *Ind. High Sch. Athletic Ass'n v. Reyes*, 694 N.E.2d 249, 256 (Ind. 1997).

Unlike most [association] cases, here we are not faced with a student athlete's challenge to an [association] decision. Rather, it is [the high school] that challenges the Restitution Rule. Although we hold in *Carlberg* that we will continue to review for arbitrariness and capriciousness [association] decisions affecting students, we see little justification for it when it comes to the [association's] member schools. As to its member schools, the [association] is a voluntary membership association. Judicial review of its decisions with respect to those schools should be limited to those circumstances under which courts review the decisions of voluntary membership associations—fraud, other illegality, or abuse of civil or property rights having their origin elsewhere.

Because [the high school's] challenge to the Restitution Rule does not allege fraud, other illegality, or abuse of civil or property rights having their origin elsewhere, we will not interfere in this school's dispute with a voluntary association of which it is a member.

. . . .

We understand [the high school] to argue that the Restitution Rule shows disrespect for the institution of the judiciary in this state. In its brief submitted to this Court, [the high school] writes, "The Second District Court of Appeals is now telling all high school administrators that their proper course of action in these types of cases is to defy Trial Court orders" We do not agree.

Contracts frequently allocate risks of unfavorable litigation results. For example, contracting parties agree that should a judgment, order or settlement prohibit a party from enjoying the benefits of the agreement, that party shall have no further obligations with respect to the contract. Doctors and attorneys purchase insurance so as to protect themselves from the consequences of lawsuits.

Couples may sign prenuptial agreements dictating what is to occur should a trial judge determine that the prenuptial agreement is unenforceable. Such agreements show no disrespect to the courts.

We presume the judgments of our trial courts are correct and valid-but sometimes they are wrong. If a school wants to enjoy the benefits of membership in the [association], the school agrees to be subject to rule that permits the [association] to require the school to forfeit victories, trophies, titles and earnings if a trial court improperly grants an injunction or restraining order prohibiting enforcement of [association] eligibility rules. Such an agreement shows no disrespect to the institution of the judiciary.

Member schools voluntarily contract to abide by the rules of the organization in exchange for membership in the association. One of those rules is the Restitution Rule. Undeniably, the Restitution Rule imposes hardship on a school that, in compliance with an order of a court which is later vacated, fields an ineligible player. On the other hand, use of an ineligible player imposes a hardship on other teams that must compete against the teams fielding ineligible players. While schools will contend that it is unfair when they have to forfeit victories earned with an ineligible player on the field because they complied with a court order, competing schools will reply that it is unfair when they have to compete against a team with an ineligible student athlete because a local trial judge prohibited the school or the [association] from following the eligibility rules. The Restitution Rule represents the agreement of [the association] members on how to balance those two competing interests. The Restitution Rule may not be the best method to deal with such situations. However, it is the method which the member schools have adopted. And in any event, its en-

forcement by the [association] does not impinge upon the judiciary's function.¹⁶¹

Even if this is so, the court did not explain why this results in validating the Restitution Rule *vis-à-vis* students.¹⁶² The court also ignored the fact that the Rule provides no *restitution* when a high school athlete's eligibility is found to have been improvidently revoked, and is therefore completely one-sided. Would the Association favor turning back the clock on all competitions to the date of the improvident revocation and having all the games played over again? Of course not, which is precisely why a court's use of its equitable powers is so impor-

¹⁶¹ *Id.* at 257-58 (citation omitted).

¹⁶² The Indiana Supreme Court did not explain why the Restitution Rule was not arbitrary and capricious in *Reyes*, which makes its disapproval of *Avant* in that opinion hard to understand. *Id.* at 258 (disapproving of Ind. High Sch. Athletic Ass'n v. *Avant*, 650 N.E.2d 1164 (Ind. Ct. App. 1995)). However, in *Carlberg*, the companion case to *Reyes* decided the same day, the Indiana Supreme Court found, for the same reasons as the Michigan Supreme Court, that enforcement of the rule was not arbitrary and capricious, because "there [wa]s no contention that the [association] failed to publicize its interpretations of the rule or failed to apply consistently its interpretations of the rule[.]" and because the association has "an interest in 'restitution and fairness' to schools which and athletes who compete against ineligible students." Ind. High Sch. Athletic Ass'n v. *Carlberg ex rel. Carlberg*, 694 N.E.2d 222, 233, 235 (Ind. 1997). See *Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n*, 467 N.W.2d 21 (Mich. 1991). Left unanswered was the arbitrary and capricious result of the rule, to wit:

[I]t wholly fails to protect the interests of an equally innocent set of actors: those teammates with whom the student participated and the schools they represented. When, as in this case, a trial court enjoins the [Association] from prohibiting participation, neither the ineligible player's teammates nor his school are free to ignore a court order. Punishing [the plaintiff's] innocent teammates and his school is manifestly arbitrary and capricious.

Carlberg, 694 N.E.2d at 245 (Dickson, J., dissenting); see also *id.* at 246 ("To punish a school or the ineligible player's teammates for complying with a court order is wrong."). For Indiana cases holding that the Restitution Rule prevents an appeal from becoming moot, see *Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840, 844-45 (7th Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999); *Crane ex rel. Crane v. Ind. High School Athletic Ass'n*, 975 F.2d 1315, 1318-19 (7th Cir. 1992). *But cf.* *Jordan ex rel. Jones v. Ind. High Sch. Athletic Ass'n*, 16 F.3d 785, 787-89 (7th Cir. 1994) (holding where the high school was not a party to the lawsuit, the appeal was moot after the season concluded because the student had not won any awards that could be taken away and thus had no further interest in the case).

tant in these cases, and without it, there is no other remedy for the innocent high school athlete who is wrongly suspended, because the Association provides none. This is why it is clear the Rule has nothing to do with restitution,¹⁶³ but rather it has everything to do with interfering with the courts' equitable powers. Otherwise, the Rule would have a section providing *restitution* for such innocent high school athletes who are wrongly suspended.

The District Court for Oregon later surveyed the law relating to state high school athletic associations' restitution rules. In the context of the irreparable harm element of a preliminary injunction analysis—which is the only way to take into account the *innocent* high school athlete—the court stated:

If [the] plaintiff is not granted preliminary injunctive relief, he will be unable to participate on the football team, as a trial on the merits of his claim cannot be conducted before the expiration of the football season. This type of injury cannot be adequately remedied by monetary damages, and plaintiff will lose for all time the chance to participate in fall sports during his final year of high school.

[The association] contends that the court should balance this hardship or injury to [the] plaintiff with the hardship that [the] [h]igh [s]chool and its supporters will potentially suffer if the court erroneously grants a preliminary injunction and the injunction is revoked after a trial on the merits or overturned on appeal. [The Association's Restitution Rule] provides:

Responsibility: If a school employee or representative declared to be in violation of any Article, Rule Board Policy, Participation Limitation, Sports Season Limitation or Board Interpretation or if a student who has been declared ineligible is permitted to participate in [a]ssociation activities or interscholastic competition because of a temporary restraining order, preliminary in-

¹⁶³ See *supra* Part I.

junction, and/or permanent injunction by a court against the school or the [a]ssociation, and if such restraining order and/or injunction is subsequently vacated, dismissed, stayed, reversed, or finally determined by the courts to not justify injunctive relief, one or more of the penalties outlined . . . above may be assessed in the interest of restitution and fairness to other member schools.

Rule 5 specifies that:

Upon a ruling by the Executive Director or by the Executive Board that a student is ineligible, the school shall forfeit all *meets, contests, or Tournaments* in which the student participated during that student's ineligibility, either before and/or after such ruling.

. . . .

[The association] argues that [the high school's] football team is currently ranked as the top 4A team in the state, is undefeated, and has an excellent opportunity to win the state championship.¹⁶⁴ It asserts that if [the] plaintiff participates in any contests and it is later determined that a waiver of the Eight Semester Rule is not warranted under the circumstances herein, that [the association] may require [the high school] to forfeit any games participated in, and that such sanctions would cause injury to the team, the school, and the community.

I am not persuaded that [the association's] invocation of the Restitution Rule mitigates against the granting of preliminary injunctive relief.

¹⁶⁴ Bingham v. Or. Sch. Activities Ass'n, 24 F. Supp. 2d 1110, 1117-20 (D. Or. 1998) (emphasis in original). "4A is the classification for the schools with the largest enrollments. Schools with smaller student bodies are grouped into 3A, 2A, and 1A classifications." *Id.* at 1117 n.2; see OREGON SCHOOL ACTIVITIES ASSOCIATION, 2009-2010 OREGON SCHOOL ACTIVITIES ASSOCIATION HANDBOOK art. 6 (2010), available at http://www.osaa.org/publications/handbook/0910/01Constitution.asp#_Toc23533253.

Assuming, *arguendo*, the validity of the Restitution Rule, an appropriate beginning to the analysis of [the] defendant's position is the observation that enforcement of the [R]ule is entirely discretionary on the part of the [association]. In the event it ultimately prevails in this litigation, I have great difficulty in understanding the reasonableness of [the association] penalizing [the] [h]igh [s]chool for allowing [the plaintiff] to play football pursuant to an interim court order under the combination of circumstances presented.

First, [the association] concedes that this is a case of first impression in the [Ninth] Circuit. The issues are important: may a learning disabled student be reasonably accommodated by a waiver of a high school athletic association's eligibility requirement? [The] [p]laintiff asserts rights conferred by the ADA, a statute of relatively recent vintage. [The] [h]igh [school] is caught in the middle of the dispute. The [high] [s]chool has no ability to prevent [the] plaintiff from seeking redress through the federal judicial system, nor is it in any position to overrule any ruling by this court on the merits of the lawsuit.

Second, [the association] does not contest [the high school] football [coach's] testimony that [the] plaintiff is a lesser-skilled player who will see limited playing time as a reserve. His inclusion on the team will confer no competitive advantage to [the high school] in its contests. If [the high school] wins a state title, it is extremely doubtful that [the plaintiff's] addition to the team will be a causative factor in this accomplishment.

Third, in the exercise of its discretion pursuant to [the Restitution Rule], the Executive Board of [the association] would surely take into consideration the public policy issues raised by the specter of sanctions. Our nation is governed by law, and our courts are delegated the responsibility of resolving legal disputes. [The plaintiff]

should not equitably be made a pariah in the community of a potential state championship football team because he pursues, in good faith, remedies arguably conferred by federal legislation.

In sum, the threat of sanctions against [the] [h]igh [school] in this case and under these circumstances is entitled to little weight in any “balance of hardships” inquiry.

. . . .

[The association] cites two state cases in support of its position that the Restitution Rule is valid.

. . . .

[However, the] [p]laintiff distinguishes *Reyes* and *Cardinal Mooney* by observing that neither case involved the ADA or the public policies it endorses.

. . . .

Unquestionably, the possibility of sanctions against [the high school] (should its coach play [the] plaintiff in any contests pursuant to the court’s preliminary injunction) has a coercive and intimidating effect on plaintiff as he seeks to exercise rights granted by the ADA. [The plaintiff] undoubtedly does not desire to become a cause of anxiety on the team and in the community as the team is threatened with forfeiture of its games should he pursue this litigation. The Restitution Rule, if applied to this case, clearly operates to dissuade disabled student-athletes from exercising their rights to petition the courts for redress. In that regard, the rule clashes head on with public policy.

The reasoning articulated in *Reyes* and *Cardinal Mooney* is unpersuasive when considered in light of such important public policy issues.

While interscholastic competitions are important, does the purpose of the Restitution Rule trump the purpose of the ADA or the purpose of providing a judicial forum for the resolution of civil disputes? Although the *Reyes* court discussed the unfairness to competitors who lost to a team with a member playing pursuant to court order who subsequently was determined to be ineligible, it does not seem to have given much shrift at all to the unfairness visited upon those who are presented with the Hobson's choice of surrendering their right of access to the courts or exposing their teammates, classmates and community to sanctions.

At the risk of sounding heretical in a culture where athletics are of such importance, one wonders if the importance of revisiting the results of games in the interest of fairness to the losers is being exaggerated.

[The association] cited a recent example that perhaps illustrates this point: [Another] [h]igh [s]chool was stripped of its 3A state football championship because an ineligible player was inadvertently allowed to play on its team. However, the school [it] beat in the championship game was not awarded the state championship—the title was simply vacated for that season. While certainly meaningful changes can be achieved if a player's ineligibility is discovered during the course of a season and forfeitures of games are computed at that point (resulting in differences in league standings and playoff berths), after the season has ended the changes become essentially asterisks on a page of history. The real point of the forfeitures at that point is prophylactic—i.e., to encourage schools to be extremely careful in screening the ineligible.

Here, by the time the case is litigated to finality and the Restitution Rule may ever become applicable, the football season will be long ended. Game results and championships might be adjusted in the record book, but

any team which lost to [the high school] on the field will not have much to gain for the adjustment. The most significant aspect of the application of the Restitution Rule at that juncture would be as a deterrent—to send schools the signal that they must not play potentially ineligible players for any reason, even with a court order.

Under these circumstances, the fairness issue becomes distorted when the interests of a team's competition is elevated above the interests invoked by society's delegation of jurisdiction to its judicial system to resolve disputes such as the instant case. As noted previously, any relief [the] plaintiff is entitled to is nullified if [the high school] has a strong disincentive to allow him to play in actual contests because down the road it might be required to forfeit the contests.

Accordingly, I find the reasoning of the court in *Crocker* . . . to be the better analysis in this area.

. . . .

For the reasons set forth above, the court grants [the] plaintiff's motion for a preliminary injunction prohibiting [the association] from applying its eligibility rules to render him ineligible to compete in athletics during his [fifth] year senior season at [the] [h]igh [s]chool. [The association] is further enjoined from applying its Restitution Rule to sanction [the] [h]igh [s]chool for complying with this court's order in the event the preliminary injunction is dissolved after trial of the case or in the event injunctive relief is otherwise set aside or overturned.¹⁶⁵

The Indiana Court of Appeals returned to the Restitution Rule issue when a high school refused to allow a student to participate in varsity athletics because of its fear of the state high school athletic association's Restitution Rule, even though a preliminary injunction had

¹⁶⁵ *Bingham*, 24 F. Supp. 2d at 1117-20.

been granted against the association allowing the student to participate—which resulted in the court upholding a finding of contempt against the association for not waiving its Restitution Rule in this instance.¹⁶⁶ In fact, the association even conceded that, “even though the Restitution Rule might have an indirect effect of causing the school to decide not to allow [the plaintiff] to participate, it was the school’s decision whether or not she participated.”¹⁶⁷

At the contempt hearing before the trial court, the association testified it knew of no other effect the Restitution Rule could have other than to influence the school’s decision *not* to play the student in varsity athletics.¹⁶⁸ The high school testified it was not playing the student out of fear of the Restitution Rule, but that absent that fear, it would have.¹⁶⁹ Based on this evidence and more, the court found as follows:

In its judgment, the trial court determined that the [association] was in contempt of the preliminary injunction, and found that the preliminary injunction was specific, that the [association] had actual knowledge of the injunction, that the [association] had purposefully and knowingly violated the preliminary injunction, and that the violation took place during the time the preliminary injunction was in effect. The trial court specifically found that the [association] “willfully and contemptuously disregarded [the trial court’s] [o]rder by forcing [the high school] to comply with the [association’s] original decision that [the plaintiff] is ineligible to participate in varsity interscholastic athletics,” and found that the [association] had failed to show that the violation was not willful. The trial court further determined that because the [association] enforces the Restitution Rule in every action where an injunction is reversed, a school might decide not to comply with an injunction for fear of the Restitution Rule’s effect if the preliminary injunction

¹⁶⁶ Ind. High Sch. Athletic Ass’n v. Martin, 741 N.E.2d 757, 760-73 (Ind. Ct. App. 2000), *aff’d in part and vacated in part*, 765 N.E.2d 1238, 1242 (Ind. 2002).

¹⁶⁷ *Id.* at 762-63.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 763.

is later overturned. Specifically, the trial court determined that “[b]y virtue of the [association’s] ‘threat’, the school is forced to violate the [c]ourt’s [o]rder and comply with the original [association] decision. This mechanism has been knowingly and willfully utilized by the [association] in the matter before this court.”¹⁷⁰

The court of appeals noted:

Here, we are presented with a challenge, not to [association] action, but to [association] inaction. In what appears to be a unique if not novel situation, school officials have, contrary to a trial court’s preliminary injunction, ultimately decided to disallow a student athlete the right to participate in a sport for which she is otherwise athletically qualified, because these officials fear the threat of the [association’s] Restitution Rule. [association] rules allow a student to participate in athletics by virtue of a court order or injunction. However, as a result of the Restitution Rule’s very real threat, this student athlete was denied the relief granted by the preliminary injunction. In effect, the [association’s] Restitution Rule has produced the same result for this student athlete as if the [association] were enforcing its eligibility decision . . . [the plaintiff] is not playing varsity basketball.¹⁷¹

In regards to whether or not an injunction invalidated the Association’s Restitution Rule, the court of appeals explained:

While in practical terms, failing to waive the Restitution Rule meant that the [association] was “indirectly” attempting to enforce its decision, the trial court did not declare that the Restitution Rule was invalid. In fact, the trial court specifically stated during the contempt hearing that “the Restitution Rule is not unconstitutional . . . [it] is still alive and well in the State of Indiana” and “[t]hat [the Restitution Rule] is not what this contempt is about.

¹⁷⁰ *Id.* at 764-65 (citations omitted).

¹⁷¹ *Id.* at 765-66.

This contempt is about, whether or not you [the association] are using that Restitution Rule to prevent [the plaintiff] from playing basketball.” Thus, the [association’s] argument that the Restitution Rule is valid has no bearing upon our determination of whether or not the [association] was in contempt of the trial court’s preliminary injunction.¹⁷²

After the court of appeals examined the association’s willful nature in violating the trial court’s order, the court upheld the \$500 per day contempt assessment.¹⁷³ In a three-to-two decision, the Indiana Supreme Court vacated the contempt action and observed: “This case is apparently the first time that the [R]estitution [R]ule has ever been cited by a high school as a reason for not allowing a student to participate in varsity athletics.”¹⁷⁴ Notwithstanding this observation, the court held the association could legitimately use the Restitution Rule to thwart the trial court’s preliminary injunction because its prior decisions had not found that the rule interfered with the judiciary’s function; the court did not, however, provide any analysis or reasoning to explain the apparent contradiction.¹⁷⁵ The dissent stated, “I dissent, believing that the majority opinion of the [c]ourt of [a]ppeals correctly decided this case. In addition, I continue to believe that we incorrectly decided [*Carlberg* and *Reyes*], upon which today’s majority opinion rests.”¹⁷⁶ Finally, the Arizona Court of Appeals refused to consider the trial court’s finding that the Arizona Interscholastic Association’s Restitution Rule was unconstitutional because the association did not appeal that issue.¹⁷⁷

In summary, eight jurisdictions have heard a challenge to the Restitution Rule, without having heard the challenge on the merits—meaning after a trial—having instead heard these challenges in the context of interlocutory, preliminary, or temporary injunctions.¹⁷⁸ For example, Kentucky found in favor of the Rule in a poorly reasoned four-

¹⁷² *Id.* at 768 (citation omitted).

¹⁷³ *Id.* at 773.

¹⁷⁴ Ind. High Sch. Athletic Ass’n v. Martin, 765 N.E.2d 1238, 1241 (Ind. 2002).

¹⁷⁵ *Id.* at 1240-42.

¹⁷⁶ *Id.* at 1243 (Dickson, J., dissenting).

¹⁷⁷ Parker *ex rel.* Parker v. Ariz. Interscholastic Ass’n, 59 P.3d 806, 814 (Ariz. Ct. App. 2002).

¹⁷⁸ See *supra* Part V.

to-three split decision; Michigan found in favor of the Rule only after the NCAA became a friend of the court; and Indiana found in favor of the rule when the NCAA was choosing where to make its very lucrative new home that turned out to be in cozy Indianapolis. But its last decision was split three-to-two, so Indiana seems to be having second thoughts.

What is interesting is that in all three of these states, the trial and appellate courts almost universally opposed the Rule in no uncertain terms. The Oregon and Tennessee Federal District Courts on the other hand, along with the Sixth Circuit, have seen the Rule for what it is and have enjoined it, as have Arizona and North Dakota. Only the Seventh Circuit has showcased the power of the Rule to allow review of otherwise moot injunctions, where the association wins by attrition.

Overall, the sample size is so small that all of this is anecdotal, even though it is a larger sample size than that regarding the NCAA's Restitution Rule. So why more decisions, whether right or wrong? In addition to the diminished effectiveness of the various restitution rules discussed above, the state athletic associations do not have unlimited litigation budgets, so the parties are much more evenly matched. Also, amateurism is not a billboard issue at the high school level like it is at the college level, where the NCAA self-appoints itself as the guardian thereof.¹⁷⁹ To see what a difference the injection of this amateurism issue into the experiment makes, one need only compare the Michigan Appellate and Supreme Court Opinions after the NCAA filed its amicus curiae brief and started to scream the sky was falling, and that amateurism (a.k.a. civilization) would be destroyed unless the court saw it the NCAA's way.

VI. CONGRESSIONAL HEARING ON THE RESTITUTION RULE AND ITS AFTERMATH

On September 14, 2004, the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. House of Representatives

¹⁷⁹ See generally Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004).

conducted a hearing on *Due Process and the NCAA*,¹⁸⁰ which the Subcommittee Chairman described as follows:

It has been [thirteen] years since Congress last examined the procedures that the NCAA uses to investigate and enforce its rules. In that time, the NCAA has made several changes, most notably the addition of a more robust appellate system for infraction cases, that have provided greater protections for member institutions, coaches and student-athletes. However, the NCAA has failed to take action on several recommendations of its own 1991 study, most notably, those relating to the hiring of independent judges to hear infractions cases and the opening of these proceedings to all. This hearing will examine those recommendations and the NCAA's decisions not to implement them. We will also examine the investigated individual's role in the process and their ability to participate fully in it. And we will examine the NCAA's [R]estitution [R]ule, which punishes member institutions in the event that student-athlete initiated litigation is ever resolved in favor of the NCAA.¹⁸¹

Professor Gary R. Robert's prepared statement to the Subcommittee commented on the Restitution Rule as follows:

¹⁸⁰ *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004), available at <http://judiciary.house.gov/legacy/95802.PDF> [hereinafter *Congressional Hearing*]; see also *Hearing Addresses Enforcement, Reinstatement Processes*, NCAA NEWS, Sept. 27, 2004, http://web1.ncaa.org/web_files/NCAANewsArchive/2004/Association-wide/hearing%2baddresses%2benforcement%2c%2breinstatement%2bprocesses%2b-%2b9-27-04%2bncaa%2bnews.html (giving NCAA's overview of the hearing).

¹⁸¹ *Congressional Hearing*, *supra* note 180, at 2 (statement of Rep. Steve Chabot, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary). The Chairman did not explain how the NCAA could have made improvements in the college athlete's appellate procedures when the NCAA does not afford the college athlete any appellate process whatsoever. Nor does it appear the Chairman understood the difference between a member's appeal on its behalf, where the member has due process rights, and a member's appeal on behalf of a college athlete, where no such due process rights exist. The fact these appeals travel on different paths and end up before different committees is probably more detail than is necessary here.

A school that allows an athlete to play in an athletic contest pursuant to a court order requiring it to do so, but the athlete is later determined by the courts and the NCAA to have been ineligible, may still be penalized by the NCAA's Division I Management Council in any of a variety of substantial ways "in the interest of restitution and fairness to competing institutions." This remarkable procedure, under which an institution can be severely penalized for doing only that which a court has ordered it to do, has nonetheless been employed on several occasions and has been found by the courts to be a lawful exercise of regulatory authority for a sports governing organization.¹⁸²

.....

. . . [Under] the "Restitution Rule" . . . the NCAA can penalize an institution for allowing an ineligible player to participate even if it did so under a court order. While this seems fundamentally unfair at first blush, on closer analysis its value becomes apparent. If an institution were not subject to penalties in such a situation, coaches could recruit a number of ineligible players, seek short-term injunctions just before important contests from local judges who often act out of partisan or parochial interests, and then allow the player to participate to the substantial competitive advantage of the team (and unfair disadvantage to its opponents), all without any fear of subsequent penalty when the appellate courts inevitably reverse the injunction. This has been the reasoning of the courts that have uniformly upheld the legality of the Restitution Rule—that the NCAA members voluntarily agreed to be subject to it and without it schools could easily obtain unfair competitive advantage through dishonorable means. Thus the rule may seem unfair on the surface, but it is important to prevent-

¹⁸² *Id.* at 10 (footnotes omitted) (prepared statement of Professor Gary R. Roberts).

ing a means for wholesale evasion of the NCAA's eligibility rules.¹⁸³

As described in detail above, Professor Roberts hardly gave Congress a balanced view of the Restitution Rule's treatment by the courts. Moreover, for a law school professor to be advocating to Congress that an unincorporated association should be able to pass rules to thwart the legal system because of a belief that local judges are biased, is simply preposterous and beyond comprehension. The horror he set out for Congress has never happened.¹⁸⁴ And if one thinks about this

¹⁸³ *Id.* at 15 (footnote omitted) (referencing *NCAA v. Lasege*, 53 S.W.3d 77 (Ky. 2001); *Ind. High Sch. Athletic Ass'n v. Martin*, 765 N.E.2d 1238 (Ind. 2002); *Ind. High Sch. Athletic Ass'n v. Reyes*, 694 N.E.2d 249 (Ind. 1997)). Professor Roberts provided no citation to any implementations of the Restitution Rule, and his only support for the supposed plural review of the rule was to one case on point.

¹⁸⁴ Professor Roberts could not be present for this congressional hearing because of Hurricane Katrina, but in the aftermath thereof, he left his deanship at Tulane University Law School to become the dean at Indiana University's Maurer School of Law located in Indianapolis, Indiana, region home of the NCAA. See Gary R. Roberts, Faculty/Staff Profile, <http://indylaw.indiana.edu/people/profile.cfm?Id=313> (last visited Aug. 30, 2010). Dean Roberts had the following opinion on the *Oliver* case:

'I think the long-term impact of this, at least at the moment, is pretty minimal,' said Gary Roberts, a sports-law expert and dean of the Indiana University School of Law in Indianapolis. Even if the ruling is upheld on appeal, he said, it would probably only apply to athletes who, like Oliver, are from Ohio or attend college there. 'I think that we have a long way to go before this book is closed,' he said.

Katie Thomas, *Uncertainty Reigns After N.C.A.A. Agent Ruling*, N.Y. TIMES, Apr. 5, 2009, at SP4, available at <http://www.nytimes.com/2009/04/05/sports/05agent.html>.

But later on, he had this to say about *Oliver*:

But it's another pending case that, because of its effect on amateurism rules, "could unravel the way the NCAA operates entirely," said Gary Roberts, dean of the Indiana University School of Law-Indianapolis and an expert in sports law.

In February, an Ohio judge ruled in favor of then-Oklahoma State University pitcher Andy Oliver, striking down an NCAA rule prohibiting players from having agents, as Oliver did in high school.

The judge said the rule — and an exception allowing players to consult with agents (but not have them negotiate with a pro team) — "hinders representation by legal counsel" and is "fraught with ethical dilemmas."

The judge in the case also struck down a rule forcing schools to risk financial and other penalties if they don't immediately suspend

from a macroeconomic viewpoint, if Professor Roberts's hypothesis were true, then all teams would gradually act likewise, and there would be a re-equalization even assuming that all state court judges would throw their Codes of Judicial Conduct out the window only to help some star local athletes.

In stark contrast, world champion skier Jeremy R. Bloom testified before the Subcommittee as follows:

[The] NCAA[']s [R]estitution [Rule] falls far short of promoting impartiality at the court level. In brief, [the Restitution Rule] states that if a student-athlete is granted relief by a court and if at any time in the future that decision is reversed by a higher court, the NCAA reserves the right not only to place sanctions on the player but reserves the right to impose financial as well as forfeiting penalties against the university for following the court order. In my experience, this [R]estitution [Rule] brought much concern to the judge who heard my case as well as spurred university officials to notify me that, even if I were granted injunctive relief by the court, that the university would not take the risk of allowing me to play for fear of possible sanctions.

In conclusion, I believe [the Restitution Rule] is against public policy; and I believe it does not promote due process. The NCAA has had decades to institute necessary changes to their practices and procedures. It

players the NCAA says have violated a rule, even if there's a court injunction allowing the person to play.

Roberts has written that the NCAA rule is necessary. He argued that it's necessary to prevent cheaters from obtaining short-term injunctions to play in important games. Such injunctions, he wrote, would come from "local judges who often act out of partisan or parochial interests."

A jury trial to decide damages in the Oliver case is scheduled for October.

Roberts thinks the NCAA will win on appeal, although he thinks the rule on agents needs to be changed.

Mark Alesia, *NCAA Could Face New Playing Field*, INDIANAPOLIS STAR, July 26, 2009, at A1.

seems like any time a congressional body of any kind suggests changes to the NCAA, they always answer in a way that they are currently attempting to improve the system, but nothing ever changes. You are the only people in this country that can initiate change and oversight, and I encourage all of you to do so.¹⁸⁵

In his prepared statement to the Subcommittee, Mr. Bloom expanded on his comments as follows:

Following the NCAA's denial of the waiver, I sought relief from the District Court of Colorado. Unfortunately, in part because of the NCAA[']s Restitution [R]ule . . . [the] [d]istrict [c]ourt . . . ruled against my request for preliminary injunction.¹⁸⁶

. . . .

Unfortunately, it has proven to be virtually impossible for a student athlete to get relief or due process within the courts as well, as a result of the NCAA's [R]estitution [Rule]. Through this by-law the NCAA has effectively imposed partiality and prejudice even within the U.S. court system.

. . . .

This single by-law grants the NCAA absolute power. The NCAA is the only organization (that I am aware of) with the power to retroactively penalize a person, community, and/or member institution because they followed a court order. In practicality, by the time the NCAA exhausts a dispute through the U.S. Courts, always with a chance that a decision could be overturned on appeal at some point by the U.S. Supreme Court, a student athlete will have grown from a teenager to a young man or woman in their mid-twenties (possibly

¹⁸⁵ *Congressional Hearing*, *supra* note 180, at 18-19 (testimony of Jeremy Bloom).

¹⁸⁶ *Id.* at 20.

without ever competing). In my own proceedings the process took [two] years and I was only at the State Appeals Court level.

Here is the real affect [sic] on the judgment that was delivered in my own case at the district court level in Colorado. . . . Judge Hale wrote in his decision:

The harm to CU (University of Colorado) would be that an injunction mandating that they declare Mr. Bloom eligible and allow him to compete on the football team would risk the imposition of sanctions pursuant to [the Restitution Rule], which would allow the NCAA to impose sanctions if an injunction was erroneously granted. These sanctions could include: forfeiture of all victories, of all titles, TV revenue, as well as others; forfeiture of games would irreparably harm all of the member[s] of the CU football team who would see their hard earned victories after great personal sacrifice nullified; the loss of revenues would harm all student athletes at CU who would find their various programs less economically viable; imposition of NCAA sanctions would harm CU's reputation; and sanctions would reduce the competitiveness of various sport teams at CU.

I find that the harm to CU and the NCAA is more far reaching, especially because it could harm other student athletes, than the harm to Mr. Bloom. Therefore, the public interest would not be served by an injunction.

These findings in no way diminish my belief that an accommodation without court involvement could have been reached without causing harm that would arise from an injunction.

Clearly this bylaw prohibits a student athlete the right to due process and is against public policy.¹⁸⁷

¹⁸⁷ *Id.* at 21-22 (emphasis omitted).

Mr. Bloom, while receiving the short end of the stick in the process, landed on his feet,¹⁸⁸ and his case now forms the predicate for all college athletes' claims against the NCAA based upon third-party beneficiary status, which was the precedent his case set and what I used in the *Oliver* case.¹⁸⁹ Given that only three speakers were limited to five minutes each,¹⁹⁰ it is not surprising that Congress took no further action after this hearing, and it is not even clear why the hearing was called in the first place. But Congress's inaction left a void that the NCAA was only too happy to fill.¹⁹¹ In 2005, the NCAA began a so-called internal review of its enforcement policies and procedures, which:

[W]as prompted by a [sic] risk assessment analysis conducted by Deloitte & Touche but [which] also is an area of [sic] emphasis in the [NCAA]'s strategic plan. The [NCAA] hired an external consultant [sic], [James C.] Duff The scope of work includes [sic] a review of all enforcement policies and procedures, including those related [sic] to the NCAA Division I Committee on Infractions, the infractions appeals committees [sic], as

¹⁸⁸ For a description of Mr. Bloom's accomplishments and successes, see <http://jeremybloom.com/>.

¹⁸⁹ See Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 922-34 (2006) (discussing third-party beneficiary status under *Bloom* and its progeny).

¹⁹⁰ Besides Mr. Bloom, who spoke, and Professor Roberts, who was unable to attend, the other witnesses were Professors Josephine R. Potuto and B. David Ridpath. *Congressional Hearing, supra* note 180, at (III) (listing the witnesses during the hearing). Professor Potuto was vice chair of the NCAA's Committee on Infractions, a member of its Division I Management Council, and a member of its Special Review Committee established as a result of the congressional hearing. *Congressional Hearing, supra* note 180, at 35 (testimony of Professor Potuto). She testified to the party line and has now published a law review article to aid NCAA outsiders in understanding the NCAA's operations. See Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257 (2010). Nowhere in her article does she even mention the Restitution Rule, let alone try to defend it. See *id.* However, she was kind enough to acknowledge, "the reason the [*Oliver*] case arose at all is that NCAA bylaws failed to state an explicit, absolute policy prohibiting agent contact." *Id.* at 278.

¹⁹¹ See Doug Lederman, *Due Process and the NCAA*, INSIDE HIGHER EDUC., June 13, 2006, <http://www.insidehighered.com/news/2006/06/13/ncaa> (describing the 2004 Congressional Hearing as giving rise to internal review by the NCAA).

well as specific waiver processes in membership services[.]¹⁹²

In a news release describing the resulting report, the NCAA stated:

An independent report reviewing the NCAA's Division I enforcement and infractions processes and procedures recommends several adjustments to control and manage risks and to improve accuracy and operational efficiencies, according to James C. Duff, Managing Partner of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC in Washington, D.C. Duff, recently appointed by Chief Justice John Roberts as Director of the Administrative Office of the U.S. Courts, was engaged in May 2005 to review NCAA investigatory, hearing and appeals process, and waiver and student-athlete reinstatement procedures. The Report has been submitted to the NCAA Special Internal Review Committee, which is overseeing consideration and implementation of the recommendations.

"Throughout its history, the NCAA has periodically reviewed its procedures to ensure that they are fair, effective, timely and consistent," Duff said. "The NCAA does not lack in rules or procedures; if anything, there are too many and they can be streamlined."

. . . .

"This review is the result, in part, of concerns developed in recent litigation," Duff said. "As a consequence, the Report — although an independent analysis — is not a public document because the examination was sought and delivered in the context of an attorney-client communication."

An executive summary of the Report that does not contain privileged information or analysis supporting the

¹⁹² NCAA, *Minutes of the NCAA Executive Committee*, ¶ 3(b) (Oct. 27, 2005), available at http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/library/legislation.

Report, nor waive any attorney-client privilege, can be found online

. . . .

The Report concludes that the procedures provided in NCAA enforcement, hearing, appeals, and waiver and reinstatement proceedings compare favorably with federal, administrative and state court process. Although the Supreme Court of the United States has ruled that the NCAA is not subject to due process requirements of the Constitution, the NCAA nonetheless substantially abides by those requirements.¹⁹³

So the NCAA said it commissioned an independent report, but later declared the report to fall under the attorney-client privilege and has refused to release the report. Yet at the same time, the NCAA had its independent investigator hold a news conference to extol the fairness of the NCAA and its processes—which waives the privilege, by the way.¹⁹⁴

What the NCAA did here was attempt to cloak itself in legitimacy via the reputation of Mr. Duff, and to deflect criticism. This is something it has done many times before. But what might a truly independent review have addressed?

Perhaps the fact that college athletes are afforded no due process whatsoever prior to having their athletic eligibility revoked by NCAA members' personnel, who have no qualification or training requirements, and who apply no evidentiary standards. In fact, college athletes have no right to appeal their loss of eligibility, while the NCAA mem-

¹⁹³ *Independent Report on NCAA Processes and Procedures Provides Recommendations to Streamline and Improve Operations*, NCAA NEWS, June 12, 2006, http://web1.ncaa.org/web_files/PressArchive/2006/Miscellaneous/Independent%2bReport%2bon%2bNCAA%2bProcesses%2band%2bProcedures%2bProvides%2bRecommendations%2bto%2bStreamline%2band%2bImprove%2bOperations.html.

¹⁹⁴ *E.g.*, 1 EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 407 (5th ed. 2007) (“[I]t is a universally applied principle that a client cannot partially disclose a portion of a privileged communication and at the same time maintain the privilege as to the remainder.”).

ber who revoked the eligibility is the only one who can. College athletes must waive their federal privacy rights under the Buckley Amendment in order for the NCAA to even consider an NCAA member's request for reinstatement,¹⁹⁵ and college athletes have no say in this so-called reinstatement process, which denies them an avenue to contest whether their athletic eligibility should have been suspended in the first place. In other words, by virtue of the way it is set up, the system is always right and can never be challenged. While there are a multitude of other issues that might have been addressed by a truly independent investigator, this so-called investigation was a whitewash that ignored the most basic and fundamental questions that should have been addressed by anyone with a modicum of interest.

VII. COMMENTATORS' REACTIONS TO THE RESTITUTION RULE PRIOR TO *OLIVER v. NCAA*

While no published law review articles on the Restitution Rule exist, a few commentators have mentioned it in other contexts. For instance, according to George Washington Law Professor W. Burlette Carter:

Where rules affecting student-athletes are concerned . . . two other rarely cited rules, . . . discourage member institutions from advocating student-athlete interests outside of the NCAA administrative process when those rules conflict with NCAA policy. First, there is the Bylaw in article 19 which states, "If a student athlete

¹⁹⁵ See Jill Riepenhoff & Todd Jones, *Secrecy 101: College Athletic Departments Use Vague Law to Keep Public Records from Being Seen*, COLUMBUS DISPATCH, May 31, 2009 (investigation on the NCAA and federal privacy rights); Jill Riepenhoff & Todd Jones, *NCAA Has Ways to Dodge Scrutiny: Privacy Law, Secure Web Site Used to Skirt Public-Records Laws*, COLUMBUS DISPATCH, June 22, 2009, at 01A. As far as injecting the Buckley Amendment as an appellate precondition, the NCAA has known this is wrong for more than thirty years. See *Buckley Amendment Outlined for SIDs*, NCAA NEWS, Oct. 15, 1976, at 3. "By law, this is not a requirement . . . to impose upon a student-athlete's right to participate in intercollegiate athletics." *Id.* (quoting Pat Ballinger of the Family Educational Rights and Privacy Act Office). Today, the NCAA inserts Buckley Amendment waivers in documentation college athletes are required to sign on an annual basis, and will not allow them to play without signing these waivers.

who is ineligible” under NCAA rules “is permitted to participate” because of a restraining order or court injunction against the institution or the NCAA, and if that injunction is later vacated, stayed, reversed or it is finally determined that injunctive relief was not warranted, the institution must provide restitution to the NCAA. That restitution can range from individual and team records being stricken, the invalidation of victories, a determination of ineligibility for NCAA championships and a loss of television coverage by the school. This rule effectively warns a school that if it seeks preliminary injunctive relief against the NCAA in court, even on behalf of a student-athlete who feels [he or she] has been wronged, it will pay a hefty penalty if that court does not ultimately uphold the underlying challenge. This rule is not driven by academic or amateurism concerns. It is driven by concerns over parity—i.e., a school that is permitted to continue playing a player later found to be ineligible has gained a competition advantage—and possibly concerns over litigation costs. Thus, the rule appears under the title “Restitution.” This rule was irrelevant to Tarkanian because the plaintiff was a coach and not a student-athlete. Also, UNLV did not seek an injunction and, indeed, no injunction rule exists as to challenges not bearing upon the eligibility of student-athletes.¹⁹⁶

Attorney Alain Lapter has explained:

Because an athlete’s collegiate career is relatively short, giving him only a brief window of time to seek redress of his claims in court, an injunction against the NCAA or the relevant school may be his only effective remedy. However, the Restitution Rule may render an athlete’s injunction meaningless because it allows the NCAA to serve its own “cross-injunction” on the member school. Member schools may be reluctant to adhere to the terms of an injunction obtained by the player and may still refuse to allow the athlete to participate, because the possi-

¹⁹⁶ Carter, *supra* note 106, at 82-83 (footnotes omitted).

ble sanctions under the Restitution Rule are so severe. Consequently . . . member schools can be coerced into siding with the NCAA during injunction hearings. Furthermore, courts seem reluctant to issue these injunctions at all for fear that a successful appeal by the NCAA would lead to crippling consequences for the member school.¹⁹⁷

More recently, Marquette Law Professor Matthew J. Mitten and Wake Forest Law Professor Timothy Davis have:

[A]dvocate[d] that courts scrutinize and perhaps invalidate on public policy grounds rules of restitution promulgated by the NCAA and state athletic associations. A rule of restitution permits athletic associations to impose particular types of penalties (e.g., forfeiture of games and vacatur of individual and team records and performances) if an institution is deemed to have violated an association's rules prohibiting ineligible student-athletes from engaging in interscholastic or intercollegiate athletic competition. The actual or threatened application of rules of restitution provides a strong disincentive for schools to allow student-athletes to participate in athletic competition even when athletes have prevailed in litigation against a sports governing body at the trial court level. Schools fear that an appellate court's reversal of a lower court ruling in favor of a student-athlete will lead to application of a rule of restitution, which creates a strong disincentive to allow him or her to participate in athletic competition until the litigation is finally resolved.¹⁹⁸

¹⁹⁷ Lapter, *supra* note 139, at 268-69 (footnotes omitted); *accord* Gouveia, *supra* note 139, at 24 (the Restitution Rule “discourages institutions from adhering to injunctions against the NCAA, and . . . may discourage courts from issuing injunctions against an institution at all”).

¹⁹⁸ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 146 n.362 (2008) [hereinafter *Athlete Eligibility Requirements*] (citations omitted).

In their forthcoming article, Dickinson Law Professor Stephen F. Ross and Attorney S. Baker Kensinger note the impact the Restitution Rule has on principles of equitable relief as follows:

Despite the propriety of injunctive relief, the Restitution Rule distorts the foregoing analysis, making courts reluctant to issue these preliminary injunctions in the first place. The rule alters the discretionary balancing of interests inherent in equity cases by adding the concern for potentially harsh retributive sanctions that will be imposed on member schools. Indeed, one trial judge expressly refused to grant an injunction for this reason [in *Bloom v. NCAA*]¹⁹⁹

Professor Ross and Attorney Kensinger also noted:

[T]he Restitution Rule serves to frustrate judicial relief granted to student-athletes, even if the athlete has conclusively demonstrated the likelihood of success on the merits, irreparable harm, and that the balance of hardships favors immediate equitable relief. The rule places member schools in an impossible position. While a court order grants student-athletes the legal right to play, the Restitution Rule prevents schools from allowing them to participate for fear of potential NCAA sanctions. The rule's clear effect is precisely the same as if the student-athlete had been required, as a condition of participation in NCAA athletics, to sign a waiver of recourse to judicial review of NCAA eligibility decisions. Yet courts in other contexts have often refused to enforce such a compulsory waiver of recourse as contrary to public policy.²⁰⁰

¹⁹⁹ Stephen F. Ross & S. Baker Kensinger, *Judicial Review of NCAA Decisions: Evaluation of the Restitution Rule and a Call for Arbitration* 7-8 (undated) (unpublished manuscript, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=stephen_ross) (footnotes omitted) (quoting *Bloom v. NCAA*, No. 02-CV-1249, slip. op., at 8 (Colo. Dist. Ct. Aug. 15, 2002), *aff'd*, 93 P.3d 621, 628 (Colo. App. 2004)).

²⁰⁰ *Id.* at 3.

Further:

The Restitution Rule constitutes, in effect, a waiver of recourse clause. Although the Restitution Rule does not preclude access to the courts on its face, it effectively stops member schools from honoring and enforcing valid injunctions. As a practical matter, by preventing the issuance and enforcement of preliminary injunctions, the rule removes the ability of the courts to independently review eligibility decisions. As a result, preliminary injunctions are rendered useless to student-athletes when NCAA member schools refuse to enforce them. This leaves ineligible student-athletes without adequate access to meaningful judicial review. As former student-athlete Jeremy Bloom stated “it has proven to be virtually impossible for a student athlete to get relief or due process within the courts . . . as a result of the NCAA’s restitution By-law.”²⁰¹

In addition:

More significantly, the Restitution Rule is not necessary to address the NCAA’s concerns about court bias towards local athletes and colleges. Even if overstated, the NCAA does maintain a legitimate interest in protecting the integrity of its rules. However, instead of developing a set of procedures that ensure NCAA rules are properly followed by creating a mechanism of independent outside review, the NCAA has chosen to effectively preclude any independent review. Under this analysis, it appears that the Restitution Rule actually works against the NCAA’s *legitimate interests*. In order to ensure that the integrity of NCAA rules are upheld, there needs to be a procedure through which eligibility decisions can be independently reviewed so that all bias can be removed from the process. As the court in *Reyes* suggested, the “Restitution Rule may not be the best way to deal with such situations.” In our view, impartial arbi-

²⁰¹ *Id.* at 19 (footnote omitted).

tration can ensure that the integrity of NCAA rules is protected through independent review.²⁰²

While this commentary is limited, it is my assertion that there is not a published legal commentator who thinks the Restitution Rule is a good idea—let alone legal.

This makes sense on two levels: (1) the Restitution Rule is used to fake out a trial court, when considering the supposed harm to third parties, because the NCAA does not enforce the Rule; and (2) the trial court and/or the court of appeals sets the appellate bond and conditions, and if the NCAA wished to have the terms of its Restitution Rule included as part of the conditions of the injunction, then it must move the court for the same. Instead, the NCAA just substitutes its judgment for the court's as to what the bond conditions should be. These two stark effects are exactly why the Restitution Rule is void as against public policy. It directly seeks to influence the issuance of an injunction, and then it seeks to overrule the court's appellate bond with one of its own making.

As we have already seen, the ultimate impact of the Rule is to encourage its members not to play the college athlete notwithstanding an injunction restoring his or her athletic eligibility.²⁰³ While the Supreme Court of Kentucky is correct that there are no risk-free appeals, the risk to be imposed upon the parties is by order of the court and not by the NCAA (i.e., one of the parties in the case), which directly usurps the court's power for the sole benefit of one party.

VIII. THE RESTITUTION RULE TAKEN TO THE EXTREME: TORPEDOING DUE PROCESS IN *PAXTON V. UNIVERSITY OF KENTUCKY*

As discussed above, I was lead counsel²⁰⁴ for James A. Paxton in the case of *Paxton v. University of Kentucky*. The sole issue in Paxton's case was whether he had a right to the protections afforded by UK's Code of Student Conduct, which required written notice of allega-

²⁰² *Id.* at 28-29 (footnote omitted).

²⁰³ See *supra* Part VI.

²⁰⁴ See *supra* notes 68-72 and accompanying text.

tions and an evidentiary hearing, as well as the same protections afforded by the Kentucky Constitution.²⁰⁵ Surprisingly, both the trial and appellate courts held that he—and, apparently, all other college athletes—have no due process rights whatsoever, resulting in James leaving UK in his senior year as a protest of this inequity.²⁰⁶ UK should have been grateful to have James on campus after he rejected a million dollar offer from the Toronto Blue Jays, who drafted him thirty-seventh in the First Supplemental Round last year.²⁰⁷ He stayed at UK so he could try to help his team win a College World Series.²⁰⁸ Unfortunately, James paid a dear price for having the integrity to stand up for himself against this abomination, with his draft stock falling to 132nd in the Fourth Round of the Draft this year.²⁰⁹

The underlying issue in the *Paxton* case was whether UK could withhold James from intercollegiate competition, merely because he refused to sit for an NCAA interview, which UK conceded he had no obligation to sit for, and UK admitted there were no allegations or evidence against him.

²⁰⁵ Motion of Appellant for CR 65.07 Interlocutory Relief, *Paxton v. Univ. of Ky.*, No. 10-CA-000178-I (Ky. Ct. App. Jan. 27, 2010) [hereinafter Appellant's Motion].

²⁰⁶ *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010), *motion denied*, No. 10-CA-000178-I (Ky. Ct. App. Feb. 19, 2010). *But see Oliver II, supra* note 5, at 22 (recognizing claims for breach of contract and tortious interference with contract for failing to give college athlete due process rights guaranteed under college's code of student conduct). The *Paxton* case was incredible, because UK admitted that there were no allegations, charges, or evidence against James, and that the sole reason for withholding James from intercollegiate play was because he refused to be interviewed by the NCAA without cause and without being given the rights afforded to him under the UK Code of Student Conduct. *See Paxton*, No. 10-CA-000178-I, at 4-5. Even more incredibly, the circuit found UK's student code did not concern athletic eligibility matters, which implies that James had no duty to even speak with the NCAA. *See id.* at 10; *see also* Jordan I. Kobritz, *Presumption of Guilt Prevents Athlete from Competing*, LEGAL ISSUES IN COLLEGIATE ATHLETICS, Apr. 2010, at 3 (discussing the unfairness visited upon James).

²⁰⁷ *Baseball America Names Paxton a Top Pro Prospect*, LEXINGTON HERALD-LEADER, Sept. 18, 2009, <http://www.kentucky.com/2009/09/18/940423/baseball-america-names-paxton.html>.

²⁰⁸ *See* Liz Mullen, *Paxton Leaves Kentucky After Losing Appeal Over NCAA Interview*, SPORTS BUS. J., Mar. 15, 2010, at 18.

²⁰⁹ Lyndon Little, *Ladner's James Paxton Drafted by Seattle Mariners*, VANCOUVER SUN, June 9, 2010, http://www.vancouver.sun.com/story_print.html?id=3128627&sponsor=.

Why would UK behave this way? UK behaved this way because it was scared the NCAA would use the Restitution Rule against the university if it allowed James to play. This fear was unfounded, however, because the Restitution Rule did not even apply to this case because James had not been declared ineligible—a prerequisite for invoking the Rule.²¹⁰ This illustrates the irrational fear the NCAA’s members have of the organization and the Restitution Rule.

²¹⁰ In regard to the Restitution Rule, the Appellant’s Motion states:

Throughout these proceedings, the [u]niversity has relied upon the NCAA’s so-called “Restitution Rule,” appearing in NCAA Bylaw 19.7, as a justification for its decision to withhold Paxton from baseball games. The [u]niversity has cited no legal authority suggesting that it is free to disregard the [c]ode and the Kentucky Constitution in order to comply with the bylaws of a voluntary unincorporated organization to which it – not Paxton – belongs. Further, Paxton has not been accused of a violation by the NCAA, so there is no rational basis on which the [u]niversity can consider his eligibility to be in question, or that it risks the NCAA’s application of the Restitution Rule. The [p]laintiff’s expert, Professor Richard T. Karcher, testified that there is no instance known to him in which a member institution has ever been sanctioned by the NCAA, because of a student-athlete’s failure to attend an interview, and that such a failure does not constitute an actionable major or secondary violation of NCAA bylaws or rules.

Even if NCAA Bylaw 19.7 is permitted to trump the [c]ode and the Kentucky Constitution, which would equate the NCAA as having the same supremacy rights as the federal government, it does not create in this case the type of Doomsday scenario predicted by the [u]niversity.

.....

The Rule then lists nine (9) “actions” that the NCAA “may” take against a member institution, ranging from the assessment of a financial penalty to the abrogation of team victories. Thus, by its own terms, the Rule has no applicability until and unless (1) the [u]niversity declares Paxton to be ineligible, (2) the NCAA refuses to restore Paxton’s ineligibility, (3) a court enters an order directing the [u]niversity to disregard the ineligibility determination, (4) Paxton competes, (5) that court’s order is reversed or “voluntarily” vacated, and, finally, (6) the NCAA’s Board of Directors decides to impose a sanction.

Not even the first step necessary to trigger Bylaw 19.7 has occurred here. Indeed, based upon the [u]niversity’s statements in this proceeding (that there are no NCAA charges or allegations against Paxton), and the [c]ircuit [c]ourt’s findings of fact (that Paxton is still “technically eligible”), it is clear that Paxton has not been declared ineligible. More importantly, Paxton did not ask the [c]ircuit [c]ourt (and does not ask this [c]ourt) for the type of relief

To fully understand how unbelievable all of this was, it is necessary to understand what was at stake in the *Paxton* case at the time. Our motion for interlocutory relief stated:

This case present[ed] the question of whether Kentucky constitutional law and a student code of conduct adopted by a public university must be honored, or whether the public university may carve out a category of students, in this case, student-athletes, to deprive of these fundamental rights and protections[.]

The authority held by the University of Kentucky . . . to discipline students exists pursuant to a Kentucky statute. Pursuant to that statutory authority, the [u]niversity adopted a Code of Student Conduct (“the Code”). No department of the [u]niversity is permitted to subordinate the Code to its own rules or processes.

that could make Bylaw 19.7 even hypothetically applicable. Paxton does not ask for an order stating that he is eligible, or reversing some future determination that he is ineligible. Paxton asks only that, if he is to be excluded from the extracurricular activity of baseball games, he receive the minimal due process protections provided by the [c]ode as well as the Kentucky Constitution.

For similar reasons, notwithstanding the [u]niversity’s reliance upon it, *NCAA v. Lesage*, does not support the [c]ircuit [c]ourt’s denial of injunctive relief or the [u]niversity’s refusal to follow the [c]ode. In *Lesage*, the University of Louisville declared a student athlete to be ineligible for violating a NCAA rule. . . . The school asked the NCAA to reinstate the student’s eligibility, and the NCAA refused. The student sought a temporary injunction to reinstate his eligibility. The trial court granted the injunction and the [c]ourt of [a]ppeals affirmed, but the [s]upreme [c]ourt reversed and held that the injunction should not have been granted. Only then could Bylaw 19.7 become applicable.

Here, Paxton has not been declared ineligible by the [u]niversity or the NCAA. To the contrary, the [u]niversity has repeatedly stated and Bell has testified that there are no allegations or charges against him, and that Paxton is eligible. Paxton does not ask this [c]ourt to reverse a finding of ineligibility, or to proclaim him to be eligible. He merely asks that the [u]niversity resolve the “questions” and “doubts” which it perceives to exist as to his eligibility in a manner which complies with the [c]ode and the Kentucky Constitution. No inequity could result from such a holding.

Appellant’s Motion, *supra* note 205, at 22-24.

The Code defines the exclusion of a student from an extracurricular activity as a disciplinary sanction, and states that such a sanction cannot be imposed unless the student first receives certain due process rights. Specifically, the student must be informed of the charges against him or her, cannot be compelled to be a witness against himself or herself, and must receive a hearing.

Paxton is a [u]niversity student who has been a member of the [u]niversity's baseball team since his enrollment. The [u]niversity has decided that Paxton will not be permitted to play in college baseball games against other schools starting February 19, 2010. Paxton has not been provided with a list of the charges against him or with a hearing. Rather, the [u]niversity asserts that there are *no charges* against him. Despite that assertion, and despite the lack of any Kentucky statute or case law suggesting that the [u]niversity may ignore the Code as to student athletes, the Circuit Court found that the Code and its due process rights do not apply to Paxton. Even if that is true, the Circuit Court failed to apply any constitutional analysis to this case. The Kentucky Constitution applies to the [u]niversity as an agency of the Commonwealth—with or without a Code. For that reason, Paxton asks this Court to grant interlocutory relief . . . since the Kentucky Constitution does not allow the [u]niversity to act in an arbitrary and capricious manner towards Paxton. The [u]niversity's arbitrary conduct is manifested by its refusal to afford Paxton due process protections, and by its stated intention to unilaterally withhold him from intercollegiate play notwithstanding the lack of any allegations or evidence against him.²¹¹

The facts of the *Paxton* case at the time were outrageous:

Paxton is a senior, full-time student at the [u]niversity. Throughout his enrollment there, he has been a pitcher on the [u]niversity's baseball team, for

²¹¹ *Id.* at 1-2 (citations omitted).

which he receives a “Grant In Aid” package to pay for his tuition and books.

As a [u]niversity student, Paxton is subject to and protected by the Code of Student Conduct. The Introduction to the Code makes its purpose clear: “As members of [the university] community, students can expect to be afforded certain basic rights and can also expect to be held accountable for certain basic responsibilities.” Article II of the Code sets forth the [u]niversity’s disciplinary system, and is expressly made applicable to “any activity sponsored, conducted or authorized by the [u]niversity” The [u]niversity’s athletic department and its baseball team clearly fall within this scope. The Code identifies “probation” and “suspension” as types of disciplinary sanctions, and defines those terms as the exclusion of a student from “privileges” and/or “extracurricular institutional activities.” Those sanctions can be imposed only at the conclusion of the [u]niversity disciplinary hearing process. The Code grants each student important due process protections, including the right to be notified in writing of “specific charges” against him or her, prior to the issuance of a disciplinary sanction. That Paragraph also incorporates “the rights outlined in Article I, Section 7” of the Code. Article I, Section 7, not only repeats the student’s entitlement to written notice of the charges against him or her, but also states that the student’s refusal to provide testimony “shall not be considered evidence of responsibility for an alleged violation.”

Although the [u]niversity is a “member institution” of the National Collegiate Athletic Association (“NCAA”), and is therefore contractually subject to numerous NCAA rules, it has conceded through its response to an Open Records Act request that there is no contract between the NCAA and the [u]niversity which binds Paxton in any way. The [u]niversity’s Athletic Di-

rector, Mitch Barnhart, testified that there is no contract between the NCAA and Paxton.

One of the [u]niversity's obligations as a NCAA member institution is to determine whether its student-athletes are "eligible" within the meaning of NCAA by-laws and other rules. If the [u]niversity believes that a student-athlete has violated one or more of those rules, then it must decide whether to declare him or her "ineligible." The [u]niversity then has the right, but not the obligation, to ask the NCAA to "reinstate" the student-athlete's eligibility. To do this, the [u]niversity submits a form to the NCAA. One of the questions on that form is whether the *member institution* (the [u]niversity) has declared the student-athlete to be ineligible.

The NCAA's own rules make clear that it is the [u]niversity—not the NCAA—which must decide whether a student-athlete is "ineligible." For example, Bylaw 14.10.1 states that a member institution's president "is responsible for approving the procedures for certifying the eligibility of an institution's student-athletes under NCAA legislation," and he or she may "designate an individual on the institution's staff to administer proper certification of eligibility." Bylaw 2.1.1 makes the institution's president "responsible for the administration of all aspects of the athletics program," and Bylaw 6.1.1 gives that president "ultimate responsibility and final authority for conduct of the intercollegiate athletics program". [sic] At the hearing on Paxton's Motion for a Temporary Injunction, Barnhart admitted that the [u]niversity does have a responsibility to certify eligibility.

The [u]niversity has certified that Paxton is eligible to participate in intercollegiate athletics. Paxton has completed a form to affirm his status as "eligible" at the beginning of each academic year in which he has been enrolled at the [u]niversity. Barnhart testified at the

hearing before the Circuit Court that, to the best of his knowledge, Paxton has met all eligibility requirements for participation on the baseball team. The NCAA has not provided the [u]niversity with any documents stating that Paxton is ineligible, or even identified to the [u]niversity any specific question regarding his eligibility. Similarly, Associate Athletic Director Sandy Bell (“Bell”) testified that there are no allegations that Paxton is ineligible. On the contrary, Paxton’s status is that he *is eligible* to play.

After his junior year at the [u]niversity, Paxton was chosen as the 37th pick in the Major League Baseball (“MLB”) draft by the Toronto Bluejays. He then had the choice of either accepting the offer or rejecting it to retain his eligibility to play baseball for the [u]niversity. He decided to reject the offer, and return to the [u]niversity to play baseball, complete his studies, and graduate. He will be eligible to be drafted by any MLB team after the 2009-2010 school year.

In September or October of 2009, Bell notified Paxton that she needed to talk with him because the NCAA wanted to interview him. Disturbingly, Bell told Paxton that he was not to tell anyone, including his parents and baseball coach, about the interview. At the hearing, Bell admitted having made that statement, but explained that she had been “instructed” to do so by the NCAA. She later apologized to Paxton and told him that she was the NCAA’s “messenger.”

Bell testified that the [u]niversity is not aware of any allegations that Paxton has violated any NCAA rules. When Paxton’s attorney asked the NCAA to provide written notice of any charges against him, the NCAA responded that it “does not provide the student-athlete specific information as to the nature or subject matter of the interview.” Despite having received no information that Paxton had violated any NCAA rules,

Bell “Googled” Paxton’s name on the internet and found a “blog” report. The blog (which, according to its internet path name, appeared on the website for a Toronto newspaper) *inferred* that the president of the Toronto Bluejays had talked with baseball agent Scott Boras about Paxton during the 2009 Draft.²¹²

During her meeting with Paxton, Bell told him that she believed the NCAA’s demand for an interview might have something to do with the blog. She did not tell Paxton why the NCAA wanted to interview him. She did not tell him that he had a right to decline to be interviewed. She did not tell him that he had any rights whatsoever pursuant to the [u]niversity’s [c]ode. She did, however, tell Paxton that a [u]niversity basketball player who cooperated with the NCAA had received a six-game suspension rather than a suspension for the entire season. From that remark, Paxton understood that he faced suspension for some unknown period of time, even if he *did* attend the interview.

After Paxton’s meeting with Bell, Barnhart told Paxton’s attorney that he would not permit Paxton to play unless he attended the interview with the NCAA. Barnhart admitted at the hearing that he told Paxton’s

²¹² *Id.* at 2-6 (citations omitted). The existence of a communication between Paxton’s attorney and the president of the Toronto Blue Jays was an inference because:

No evidence was introduced at the hearing that the [u]niversity has verified the contents of the blog, nor has Paxton been provided with any information that such a verification has been made. Bell testified that she does not know the author of the blog. However, the [u]niversity has apparently accepted hearsay statements – four times removed – as true (the blogger quoted the Bluejays president, who quoted Boras, who referred to Paxton). Moreover, the blog states: (1) that the president of the Bluejays “handled the negotiations with Paxton,” (2) that Paxton’s agent is Scott Boras, and (3) that, according to the Bluejays president, “[w]hen Boras is involved . . . you can only talk with Boras.” Even if the statements are correct, therefore, the report does not state that the Bluejays president negotiated directly with Boras about a contract with Paxton.

Id. at 6 n.3.

attorney that the NCAA makes up its own rules, and that the NCAA holds Paxton's "life in his hands" and controls his fate as a student-athlete. At a subsequent meeting, Bell and Barnhart told Paxton directly that he could not play in baseball games unless he submitted to the interview. The [u]niversity has admitted in court filings that it cannot compel Paxton to submit to such an interview, since Paxton is not a member of the NCAA. Thus, the [u]niversity is trying to force Paxton to do something that it cannot compel him to do.

The [u]niversity has thus presented Paxton with a Hobson's choice. Based upon Bell's statements to him, he faces a suspension from baseball games for some unknown period of time if he does attend the interview. Based upon Barnhart's statements to his attorney, and testimony at the hearing, Paxton will not be permitted to play in baseball games if he does not attend the interview. This "choice" has been presented to Paxton in the context that there are no allegations against him and no evidence of any wrongdoing by him, yet the [u]niversity is trying to extort an interview from him in order to appease the NCAA, when it has acknowledged that it has no ability to require his attendance at such an interview.

Confronted with that choice, and in light of Barnhart's statement that the NCAA holds his "life in his hands," Paxton filed a Complaint and Petition for Declaratory Relief with the Fayette Circuit Court, as well as a Motion for a Temporary Injunction pursuant to CR 65.04. Paxton alleged that the [u]niversity's decision to exclude him from games because he declined to submit to an interview with the NCAA (which, according to Bell, would also lead to a suspension), was arbitrary and capricious under Section 2 of the Kentucky Constitution. He further alleged that the [u]niversity's refusal to follow the due process provisions in its own Code also violated Section 2 of the Kentucky Constitution.

Before the [c]ircuit [c]ourt, the [u]niversity took fundamentally irreconcilable positions. Specifically,

- The [u]niversity repeatedly stated that there are no charges or allegations against Paxton by either the [u]niversity or the NCAA. At the hearing, Barnhart and Bell confirmed this fact. On the other hand, the [u]niversity stated that there are “questions” and “issues” relating to his eligibility.
- The [u]niversity has stated that the reason for those “questions” (despite the lack of any allegations or charges) is Paxton’s decision not to attend the interview, and that the matter could be resolved if he did attend. On the other hand, the [u]niversity has stated that Paxton’s refusal to be interviewed by the NCAA “has never been the issue.”
- The [u]niversity claims that, despite the above-quoted NCAA Bylaws that place the sole decision of eligibility determination upon the [u]niversity, the decision about whether Paxton may participate in the extracurricular activity of baseball games is made by the NCAA, not by the [u]niversity. On the other hand, the [u]niversity concedes that it (not the NCAA) “has decided that [the] [p]laintiff will not be permitted to compete” if his “eligibility is still in question.”
- The [u]niversity’s representatives admitted at the hearing that baseball games constitute “extracurricular activities” and that Paxton will not be allowed to play in those games unless he attends the interview with the NCAA. Those same representatives insisted, however, that the Code does not apply to Paxton’s exclusion from baseball games. When asked to explain that inapplicability, Bell and Barnhart simply stated that the Code was not the “process” which they followed. No evidence was introduced by the [u]niversity as to how that “process” could supersede the [u]niversity-wide [c]ode, let alone the Kentucky Constitution.²¹³

²¹³ *Id.* at 6-9 (citations omitted).

After hearing these outrageous facts, the circuit court's refusal to grant a temporary injunction was confusing, to say the least:

On the same day as the hearing on Paxton's [m]otion for a [t]emporary [i]njunction, the [c]ircuit [c]ourt denied the [u]niversity's "[m]otion to [d]ismiss" (which, as the [u]niversity conceded, relied on matters [sic] outside the pleadings and so was properly treated as a motion for summary judgment). By denying the [u]niversity's [m]otion, Judge Ishmael implicitly found that Paxton had stated a viable cause of action in his [c]omplaint. Judge Ishmael noted that issues of fact existed as to the legal relationships between the parties and who, exactly, "is making the call" about whether Paxton can participate in baseball games.

Later that same day, the [c]ircuit [c]ourt held a hearing on Paxton's [m]otion for a [t]emporary [i]njunction. Such a motion does *not*, of course, require a movant to show a "substantial probability" of ultimate success on the merits. Nevertheless, and despite finding no legal relationship between Paxton and the NCAA, and after finding that the [u]niversity makes the initial decision about whether Paxton is "eligible" to play in baseball games, the [c]ircuit [c]ourt denied the [m]otion. Judge Ishmael's [o]rder, entered on January 19, 2010, incorporates the findings of fact and conclusions of law made orally at the hearing [on January 15th].

Judge Ishmael made the following important findings of fact: (1) Paxton is a student in good standing at the [u]niversity; (2) the NCAA has not identified to either the [u]niversity or Paxton what "issues" affect his eligibility; (3) there is no legal relationship, "contractual or otherwise," between a student athlete and the NCAA; (4) Paxton has confirmed his eligibility; (5) NCAA rules provide that the [u]niversity must make the initial determination of Paxton's eligibility; (6) Paxton has not been declared ineligible by anyone and remains "eligible"

under the NCAA's guidelines; but, (7) the [u]niversity will not permit Paxton to play in baseball games unless he submits to an interview with the NCAA.

Despite those findings, and without citing any legal authority, Judge Ishmael concluded that the due process rights provided by the [u]niversity's [s]tudent [c]ode do not apply to the [u]niversity's decision to exclude Paxton from the extracurricular activity of baseball games. That conclusion was based upon the finding that the [u]niversity had not charged Paxton with a violation of the Code, such as on-campus intoxication, drug use, or theft. For the reasons set forth below, the Code does apply, and the [u]niversity's failure to follow it constitutes both a breach of its contract with Paxton and a violation of Section 2 of the Kentucky Constitution. Judge Ishmael's conclusions of law and order overruling the [m]otion for a [t]emporary [i]njunction constitute an abuse of discretion.

The [c]ircuit [c]ourt made no conclusion of law as to Paxton's claim that, independent of the [c]ode, the [u]niversity's requirement that he submit to an interview with the NCAA as a precondition to his participation in baseball games, even though he has not been notified of any charges against him, is itself arbitrary and capricious and therefore violative of Section 2 of the Kentucky Constitution. The omission of that conclusion of law is significant: if Judge Ishmael correctly concluded that the [c]ode is inapplicable (which Paxton disputes), then *no* [u]niversity rules or standards govern its decision to prohibit Paxton from playing in baseball games. Such an outcome is inherently arbitrary and capricious, because the [u]niversity, as an agency of the Commonwealth, is required to have processes and procedures that satisfy the Kentucky Constitution and to follow the same[.] This was an abuse of discretion.²¹⁴

²¹⁴ *Id.* at 9-11 (citations omitted).

The Kentucky Court of Appeals failed to discuss the errors claimed by Paxton on appeal, and it upheld the circuit court without addressing these important issues head-on.²¹⁵

As such, the *Paxton* case brought the interplay between due process and the Restitution Rule full circle from 1975-76.²¹⁶ Prior to Paxton, the Restitution Rule was adopted in lieu of due process requirements.²¹⁷ Thereafter, Policy 13 was recommended to the NCAA members to adopt due process hearings for college athletes—yet none apparently did.²¹⁸ Flash forward thirty-five years, and we now have the ultimate insult of UK denying James a hearing based upon its imagined fear of noninvocable penalties, which means the Restitution Rule has now torpedoed due process after submarining it for all of these years—which is a great result for the NCAA, but an embarrassment for its members, and a travesty for college athletes, who are relegated to second-class status on campus.

So why would James not have gone to an NCAA interview, if he had nothing to hide? The best answer is a counter question: Who would agree to be interrogated by a third-party, who disclaims any contractual or fiduciary relationship with the college athlete?

First, at UK, students have due process rights under UK's Code of Student Conduct,²¹⁹ faculty have these rights by Kentucky statute,²²⁰ James' coach and the athletic director have these rights via their lucrative contracts,²²¹ and UK has these rights via NCAA Bylaw 32,²²² which affords it the rights, when it is being investigated, that it has ironically denied to James. In addition, all of these persons have the rights guaranteed by the Kentucky Constitution.²²³ James simply re-

²¹⁵ *Paxton v. Univ. of Ky.*, No. 10-CA-000178-I, *passim* (Ky. Ct. App. Feb. 19, 2010) (on file with author) (denying Appellant's Motion).

²¹⁶ *See supra* Part III.

²¹⁷ *See supra* Part III.

²¹⁸ *See supra* Part III.

²¹⁹ Appellant's Motion, *supra* note 205, at 16.

²²⁰ *Id.* at 1.

²²¹ *Id.* at 15.

²²² DIV. I MANUAL, *supra* note 6, art. 32, at 387-98.

²²³ Appellant's Motion, *supra* note 205, at 17-19.

fused to be treated differently from everybody else, notwithstanding the courts' viewpoint that he was to enjoy no such right.

Second, an NCAA *interview* is in reality an inquisition via interrogation by ambush without any notice of what the subject matter will be.²²⁴ The NCAA and its members, here UK, sometimes rely on confidential witnesses, dubious so-called evidence, like blogs, without any standards for credibility or weight, and so on.²²⁵ At the end of the inquisition, UK, under the supervision of the NCAA, can make a summary determination of eligibility, without even putting its reasoning or the alleged violations in writing to James.²²⁶ So when the UK Athletic Director stated the NCAA held James's life in its hands, he was not kidding, because the NCAA can essentially do whatever it wants.²²⁷ Under NCAA rules, only UK can suspend James, all suspensions are indefinite by definition, only the NCAA can then reinstate James, and whatever penalties are imposed by the NCAA as a condition of reinstatement.²²⁸ James has no right to even seek his own reinstatement, and only UK, which has prosecuted him, can supposedly *represent* him on reinstatement, subject to whatever position regarding his future it decides to take, even if James disagrees with it.²²⁹ The NCAA provides no mechanism to determine whether or not the member should have suspended the college athlete in the first place, James has no right to contest that except in court, and in the history of the NCAA, the NCAA has never found that a member incorrectly suspended a student-athlete, even though a zero error rate for prosecutions is logically impossible.²³⁰

Third, it was indicated to James back in September by UK that, if he went to the NCAA interview, he would be suspended—even though UK said it did not know why.²³¹

²²⁴ *See id.* at 5-6.

²²⁵ *See id.* at 6.

²²⁶ *Id.* at 5.

²²⁷ *Id.* at 7.

²²⁸ *See Johnson, supra* note 15, at A9.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Appellant's Motion, *supra* note 205, at 6.

In the fall of 2009, UK told James if this was about the so-called no agent rule, and if James went to the *interview* and asserted his attorney-client privilege regarding his communications with his attorneys, he would be suspended; in fact, UK opined that it felt the NCAA Division I Manual supersedes James' right to have confidential and privileged communications with his attorneys, which is mind-boggling.²³² UK stated in its press release "it is disappoint[ed] that James is unwilling to go through the normal NCAA process[.]"²³³ which ignores the fact that the so-called process can hardly be said to be *normal* in a civilized society. In fact, UK and the other NCAA members do not believe that such a process would be fair to them, so as voting members of the NCAA, they have negotiated their own due process protections that apply to them but not the nonmember college athletes.²³⁴ This is hypocritical to say the least.

James's lawsuit against UK was a civil rights case under the Kentucky Constitution, where he challenged the denial of due process rights to student-athletes by a state agency, which UK is, yet the circuit court did not even discuss the merits of this challenge.²³⁵ Likewise, the court of appeals did not analyze or even discuss any of the arguments advanced on James's behalf, and, instead, it blamed James for this situation, which was hardly of his making, after UK advanced its *blame the victim* theory.²³⁶ James has been told all along by UK that it was on his side, but one would never know that by reading its filings with the courts, where it adamantly defended its practice of denying James and all other college athletes their civil rights.²³⁷ While James could have sought discretionary review in the Kentucky Supreme Court, any such review, if at all, would have come long after the baseball season was

²³² *Id.* at 5-7.

²³³ Sullivan, *supra* note 70.

²³⁴ DIV. I MANUAL, *supra* note 6, at 387.

²³⁵ Paxton v. Univ. of Ky., No. 10-CA-000178-I (Ky. Ct. App. Feb. 19, 2010) (denying Appellant's Motion).

²³⁶ *Id.*

²³⁷ Appellee's Response to [Appellant's] Motion for 65.07 Interlocutory Relief, Paxton v. Univ. of Ky., No. 10-CA-000178-I, *passim* (Ky. Ct. App. Feb. 8, 2010).

over, thus making the effort a futile one, all the while leaving James in limbo during the remainder of the season.²³⁸

IX. TRYING THE *OLIVER v. NCAA* CASE

In my opinion, if one wants to seriously challenge the NCAA, one has to do so on the merits at trial, after full discovery. Yet, almost every case brought by a college athlete against the NCAA has been litigated on preliminary injunction with limited-to-no discovery, even though one can move the court to consolidate the preliminary injunction with the trial on the merits—like I did. In addition, almost no one has sued for damages, which leaves nothing left to try, if the court denies the preliminary injunction. Therefore, it is important to leave the damages option open. Finally, one should have a claim for declaratory judgment included in the complaint, and then should move to bifurcate the trial on the declaratory and injunctive claims from the damages claims, which I did and was denied, but when the NCAA made the same motion, it was granted. The result after we won was there was no final appealable order until the damages trial was over, which the court later scheduled nine months off.²³⁹

Since, apparently, no college athlete has effectively sued the NCAA on the issues discussed herein, I have included my post-trial brief as an appendix to this article. Our victory was based upon overwhelming evidence in our favor, rather than a locally biased trial judge, as the NCAA apparently would imply to avoid addressing the merits of the case.

²³⁸ *Attorney Explains Why UK Pitcher Left*, LEXINGTON HERALD-LEADER, Mar. 3, 2010, <http://www.kentucky.com/2010/03/03/1163964/attorney-explains-why-uk-pitcher.html>.

²³⁹ Plaintiff's Proposed Findings of Facts and Conclusions of Law at 1-37, *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Feb. 12, 2009) (on file with author).

X. PROVING AT TRIAL THAT THE NCAA USES ITS RESTITUTION RULE TO DEPRIVE COLLEGE ATHLETES OF THEIR RIGHT OF ACCESS TO THE COURTS

As stated in my post-trial brief:

At [t]rial, the [d]efendant NCAA also admitted that Bylaw 19.7 was designed and implemented to deprive non-member student-athletes of their right of access to the courts, because it does not believe that these non-members should be able to circumvent the so-called administrative processes afforded to its members—and not to the student-athletes, themselves! Even the [d]efendant NCAA’s own expert witness admitted that if this purpose was proven, it would create a “problem” for the [d]efendant NCAA vis-à-vis this [c]ourt invalidating such a direct attack on the constitutional right of access to the courts and the constitutional delegation of judicial power to the courts of this state. While the [d]efendant NCAA attempted to explain away that this was a form of member-to-member equalization in order to achieve some sort of remedial fairness, that is what the courts are for, and no amount of justification can save a rule designed with such an illegitimate purpose. . . .

As this Court may recall, the [d]efendant NCAA first argued for joinder of OSU in its [m]otion to [d]ismiss, because otherwise OSU might not comply with any injunction that this Court might issue, since it was not a party, and due to the negative effects that might befall it under the [d]efendant NCAA’s Restitution Rule, Bylaw 19.7. The [p]laintiff opposed this effort on the basis that the former [d]efendant OSU, as a member of the NCAA, would be bound by any injunction issued hereby, and that it was thus not a necessary or indispensable party; moreover, the [p]laintiff pointed out that the implicit or explicit coercive effect of NCAA Bylaw 19.7 was hardly reason to order joinder, but instead stood for the proposition that this Bylaw should be declared inva-

lid by this [c]ourt, because of just this effect argued by the [d]efendant NCAA. Essentially, the [d]efendant NCAA has made the [p]laintiff's case for him in regards to the invalidation of this Bylaw—something that it has not admitted in other cases related to this topic.²⁴⁰

So what was this evidence beyond the motions and briefs filed by the NCAA with the court? The NCAA's Vice-President for Division I, S. David Berst, Jr., testified as follows:

Q: Are you familiar with the restitution rule of the NCAA?

A: I am, yes.

Q: And it's currently labeled Rule 19.7?

A: Yes.

Q: And previous to that it had different numbering?

A: Yes, 19.8 and enforcement 10, I think yes, I think so.

Q: If I were to ask you to give me an overview of the legislative history of the restitution rule, is that something you can do?

A: Reasonably, I think. It was — actually it was adopted in the same convention that we've been talking about recently. There was a series of proposals related to discipline of members, and in 1975 the restitution rule was adopted. Actually it is a little surprise to me that it goes back that far, but I learned that by looking at what you're looking at.

And the idea of it was that, up until that time, when institutions were involved in playing an ineligible player for whatever reasons, sometimes that's a clerical error or it could be due to a violation or it could be because they didn't learn the person was ineligible until after the competition occurred, it's not unusual for the school to forfeit and give back what it gained improperly.

²⁴⁰ *Id.* (citations omitted) (on file with author).

And that's the concept in the law, I guess, of restitution, and you all would be much more familiar with that than I am, is that the person that gains something or the entity that gains something improperly should return the benefit to those who were aggrieved, and restitution grew out of that and I think was drafted by our lawyer at the time.

And the notion was that we were also involved in some cases related to due process in particular in those days. And while the issues that pertained to the student-athletes certainly were appropriate, if, at the end of the day, the NCAA or the institution involved in the case prevailed in the case, or I think they use the words "it providently issued" — which is one of the changes along the way, to get rid of those words.

But the idea was that if the TRO or the permanent injunction was overturned eventually and the student-athlete involved participated while ineligible, that the institution involved would be subject to the restitution provisions, which merely means that, I guess in those days, the NCAA council which has had various iterations to — in the 20 years later became the management council and more recently is the board of directors which is a group of presidents, would consider the various paragraphs of the restitution rule and apply them possibly, if appropriate. It's a decision they would have to make, at least, whether to apply any of the provisions of restitution if the NCAA or institution prevailed eventually in the case.²⁴¹

Mr. Berst testified further as follows:

Q: Is there a bylaw that requires member institutions to comply with injunctive either TROs or preliminary injunctions or permanent injunctions issued against the

²⁴¹ Transcript of Videotaped Deposition of Samuel David Berst, Jr., at 56-60, *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Feb. 12, 2009) (on file with author).

NCAA? . . . To which the member institution is not a party to the proceeding.

A: I would think that an institution would be, as we are, governed by the law and by the TRO or injunction. So absent an injunction or TRO that applies to an institution, regardless of what's happening to the NCAA, the institution would be obligated to apply rules or eligibility rules.²⁴²

Mr. Berst then testified about the status of the then pending case of *Mauk v. NCAA*,²⁴³ where the quarterback of the University of Cincinnati football team had received a temporary restraining order reinstating his athletic eligibility, but the president of the university, who also sat on the NCAA's Division I Board of Directors, was refusing to allow him to practice, choosing to follow the NCAA's bylaws rather than an Ohio trial court order.²⁴⁴

The NCAA's Vice-President for Membership Services, Kevin C. Lennon, testified as follows:

Q: In terms of the Restitution Rule, you testified on direct the membership doesn't believe it's appropriate to seek outside legal relief after its exhausted the administrative remedies provided in the Division I Manual; is that correct?

A: That's correct.

Q: And that's the reason for the rule, correct?

A: Yes.²⁴⁵

The NCAA's legal ethics and professional responsibility expert witness, Alvin E. Matthews, Jr., Esq., testified as follows:

Q: Thank you. Now, are you familiar with the Restitution Rule that the NCAA has?

A: Somewhat, yes.

²⁴² *Id.* at 61-62.

²⁴³ *Id.* at 63-64.

²⁴⁴ *Id.* at 62-67.

²⁴⁵ Transcript of Trial Testimony of Kevin C. Lennon at 689, *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Feb. 12, 2009).

Q: Okay. If the Court heard testimony and if the Court sitting as the finder of fact were to find that the exclusive reason for Bylaw 19.7 was to punish third parties who refused to accept the administrative remedies afforded - supposedly afforded by the NCAA and files suit, in other words, the Court were to find that the mission, goal and strategy of Bylaw 19.7 was to circumvent a third party non-member's right of access to the Court, would that affect the opinion you've expressed regarding the constitutional - not the constitutionality, whether or not - would that affect your opinion regarding Bylaw 19.7?

. . . .

A: Given - given the information that you've given me if that was their only reason then there might be a problem with it.²⁴⁶

The plaintiff's legal ethics and professional responsibility expert witness, Michael E. Murman, Esq., testified as follows:

Q: Have you had an opportunity in your retention - during your retention in this case to study NCAA Bylaw 19.7, which is also referred to as the NCAA's Restitution Rule?

A: I have reviewed the Restitution Rule.

Q: Can you tell us your understanding of what that Rule is and what it - and what effect it has on its member organizations to your knowledge?

A: The Restitution Rule provides that if a amateur athlete, a student athlete, is permitted to participate in a event because a Court has issued a order, temporary restraining order and preliminary injunction, permanent injunction, that prohibit or prevents - it prevents the institution or the NCAA from carrying out a suspension if such an event occurs and the student participates under the protection of the Court and later the case is reversed on appeal, abandoned by the student, otherwise for some reason or another the - the order is set aside or changed,

²⁴⁶ Transcript of Trial Testimony of Alvin E. Matthews at 1098-99, *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Feb. 12, 2009) (on file with author).

then the school that permitted him to play under the protection of the Court order may be subject to having the games reversed or changed. If you won the game it could - it could cause you to forfeit the game. If you qualified for a - a tournament or for some post season play it could qual [sic] - it could erase the fact that you had qualified and in addition, if there were revenues that were generated by the play, for example, a bowl game or a sporting event in which there were significant or any kind of revenues, television revenues or whatever, that the net distribution that you got because of being a winning team would be forfeited and would go back to be distributed to a - some kind of a fund, I can't remember whether it was for - I can't - it goes to some kind of a fund. So it effectively would reverse the effect of the restraining order or the injunction.

Q: If the Judge in this case were to find that Bylaw 19.7 provides an incentive to NCAA member institutions, such as Oklahoma State, not to follow valid Court orders, such as temporary restraining orders, preliminary injunctions and permanent injunctions, would that violate the Public Policy of the State of Ohio in your opinion?

A: In my opinion it would.

Q: And can you explain to the Judge why?

A: Well, the point of a restraining order is to maintain the status quo while the Court has an opportunity to reach the merits and eventually decide the case. And if the - the parties rely on the restraining order and abide by it, things happen, it later - the Rule says well, we don't care whether you did that legally under the protection of the Court we're going to take it away from you anyway, in my opinion that violates Public Policy because it has a very direct impact, not just on the member institutions, but on the student-athletes. Not only the student-athlete who perhaps was allowed to play, but on his teammates and none of whom are even present or heard or represented at proceedings.

Q: In this case, if the Judge were to issue a permanent injunction restoring Andy's eligibility without further conditions and if Oklahoma State were to choose not to play Andy because of the Restitution Rule, do you have an opinion whether or not the Restitution Rule, Bylaw 19.7, would be effectively circumventing the power of this Court?

A: It would be an attempt to circumvent it. It would certainly cause the Court to, if it wanted to enforce it, it would have to hold them in contempt. . . .

Q: Mr. Murman, in terms of forming your opinion regarding Bylaw 19.7, also called the Restitution Rule, can you explain to the Court the research that you've done to support your opinion?

A: Well, I - one of the things I did is look at the cases that have - have dealt with the Rule. There are a number of reported cases in which the Rule has been questioned. I also looked at the - at some cases concerning contempt -

A: Cases concerning contempt, I looked at some cases concerning the powers of the Court to enforce injunctions and restraining orders.

Q: And were you able to determine whether or not it was a settled question or an unsettled question of law as to whether or not Bylaw 19.7 unconstitutionally or impermissibly interfered with the power of the Court?

A: In my opinion it's an unsettled question.²⁴⁷

Obviously, once the NCAA admitted that the purpose of the Restitution Rule was to deny access to the courts, the game was over, so-to-speak. Striking this rule left the NCAA and its members in the same position as every other litigant facing an injunction that a court might later reverse on appeal, which leveled the playing field, rather

²⁴⁷ Transcript of Trial Testimony of Michael E. Murman, Esq. at 461-65, *Oliver v. NCAA*, No. 2008-CV-0762 (Ohio Com. Pl. Feb. 12, 2009) (on file with author).

than giving the NCAA some special right to interfere with the judicial process that nobody else has.²⁴⁸

XI. DEFEATING THE NCAA'S COMMON DEFENSES & THEMES

The level of rhetoric that spews forth from the NCAA is beyond belief, unless you are the one who has to read and respond to it, but it explains a lot about how the NCAA thinks as an institution. However, a litigant opposing the NCAA must be prepared to attack the abundance of odd arguments head-on because of the historical deference given to the NCAA by the courts.²⁴⁹ I will not pretend to address every argument they will throw, but here are some of the common themes, which are all part of the *big lie* the NCAA cloaks itself with.

The NCAA's proposition that a court may not substitute its judgment for that of the NCAA's highlights that the NCAA truly believes it is above the law, even though a court's sole function is to substitute its judgment for others' and that is what a court does in every case, subject to the applicable law. As a corollary, there is no presumption that the NCAA's bylaws are valid; rather, a plaintiff bears the burden of proof that the bylaws are arbitrary and capricious, just as a plaintiff does on any claim. Equally misunderstood, the courts have shown deference to unincorporated associations when there is a dispute between *its* members and *the* associations, because the members' real remedy is to quit the clubs they do not like, subject to certain legal exceptions. Here, a college athlete is not a member of the NCAA, and there is no case where an unincorporated entity should be afforded deference in regards to actions taken against a nonmember third-party. But that will not stop the NCAA from defending on a First Amendment right of association, as if the First Amendment authorizes interfering with third-parties, when it has no application to such conduct.

This of course begs the question of who appointed the NCAA to govern college athletes in the first place, when this authority has not been delegated by Congress or the several states? The fact is the

²⁴⁸ As far as the legal authorities cited by the NCAA, in not a single one has the NCAA ever admitted to the illegal purpose of the Rule, and had it done so, presumably, those cases would have turned out far differently, as discussed above.

²⁴⁹ See *Oliver v. NCAA*, 920 N.E.2d 203, *passim* (Ohio Com. Pl. 2009).

NCAA has no legal right to regulate nonmember college athletes, but it has been doing it for so long that its right is simply assumed rather than questioned. And if a college athlete or court challenges this, the NCAA will actually and unbelievably mount a Dormant Commerce Clause defense, on the basis that it is exempt from regulation by state courts,²⁵⁰ when this doctrine is totally inapplicable to a court exercising both personal and subject matter jurisdiction—which will then lead to the NCAA making up a so-called extraterritorial defense, which ignores first-year law school teachings on the several states' long arm statutes.²⁵¹ The fact is any state court has personal and subject matter jurisdiction over the NCAA, so any declaratory judgment applies to the NCAA, itself, and is not limited geographically. As such, there would be no concern with unequal application, which is another harbinger the NCAA will bandy about.

This brings us to the question of whether a contractual relationship exists between the NCAA and the athlete, because the only other creative argument would be to imagine a fiduciary relationship. In the *Oliver* case, we submitted ample evidence of a contractual relationship with the NCAA, yet the NCAA denied any direct contractual relation-

²⁵⁰ If the NCAA was incorporated as a nonprofit, which it is required to be in order to be a tax-exempt charitable organization, then it would be subject to regulation by the state of incorporation's attorney general, but as it is now, nobody, meaning no state or federal agency, regulates the NCAA, and the only price it pays for that freedom is it can never remove to federal court on diversity grounds, because as an unincorporated association, it is a citizen of every state in which it has a member (all fifty states). See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 114 (2010); 28 U.S.C. § 1441(b) (2006); see generally GEORGENE VAIRO, MOORE'S FEDERAL PRACTICE - CIVIL § 107.14 [2][b] (2008). Professor Colombo notes the NCAA, as an IRC § 501(c)(3) entity, must be incorporated as a nonprofit, and it must not engage in lobbying activities, yet he does not acknowledge or explain how the NCAA, which is unincorporated, and which maintains a full-time lobbying office in Washington, D.C., even qualifies for this designation. Nor does Professor Colombo acknowledge or examine the NCAA's for-profit subsidiaries, such as the Eligibility Center, LLC, which makes money from what is supposedly part of its tax-exempt purpose, i.e., determining college athletes' eligibility for intercollegiate athletics. Colombo, *supra*.

²⁵¹ The fact is, a college athlete with standing—contractual, third-party beneficiary, fiduciary, or otherwise—can have NCAA bylaws declared void. That is what we did in *Oliver*, and that judgment against the NCAA is against the NCAA, not just the Ohio NCAA, as if there is such a thing. *Oliver III*, *supra* note 5, *passim*.

ship, and it would not even address any third-party beneficiary duties. So if a contractual relationship does not exist between the NCAA and the college athlete, then, again, what authority would the NCAA have to regulate college athletes if there is no agreement to do so? Why should any college athlete henceforth abide by the National Letter of Intent, since the NCAA says that is not its contract? Why should any college athlete sign any NCAA forms, including its annual student-athlete eligibility statement and other like papers, when the NCAA says those documents are not contracts either, even though the NCAA asks college athletes to assign their rights to privacy and publicity to the NCAA without any consideration? Why should a college athlete follow the NCAA Manuals, if those are not contracts, either? Why should a college athlete follow or exhaust nonexistent NCAA remedies, if there is no contract requiring it? If there is no contractual relationship, then what is there?

Ironically, the NCAA simply cannot admit to any relationship with college athletes, because once it admits to this it will actually provide college athletes with rights. But this irony results in any court looking beyond the surface to immediately spot the absurdity of it all. The court looking further costs the NCAA a lot in credibility which only gets worse for the NCAA, when it is forced to admit it must treat college athletes with good faith and fair dealing, yet it cannot and will not admit where such duties come from. But that will not stop the NCAA from putting up the bogus defense of the college athlete breaching the contract that it denies exists. And when it cannot get any stranger, the NCAA will defend on violation of the Contracts Clause, if any court purports to have authority to review its Bylaws, as if that Clause purports to allow an invasion of nonmember, third-party rights?

If the college athlete brings a claim for tortious interference with his or her college or university, the NCAA will defend on the ground that it cannot tortiously interfere with a contract to which it is *not* a stranger. Yet the NCAA cannot have it both ways, because it denies any relationship with college athletes, which makes it a stranger to the contract and liable for tortiously interfering with the same. And what would those contracts be? How about the college athlete's National Letter of Intent, college or university's student code of conduct, athletic

compliance policies, and rights guaranteed to such athletes in the several states' constitutions, among others.

When the process is examined, it is all one-sided against college athletes, who have no rights whatsoever in the NCAA. Similarly, NCAA member employees do not have rights in the NCAA. The NCAA members have due process rights under Bylaw 32 as well as others. Yet there is no procedure for any college athlete or NCAA member or its employees to bring grievances against the NCAA, itself, apparently because the NCAA can never be wrong. This is exactly why litigation arises against the NCAA, because it provides no possibility of itself ever finding itself to be wrong.

As demonstrated above, there is no question the NCAA carries out its enforcement in large part through its members, who act as its agents. *Tarkanian* did not overrule all fifty states' unincorporated association laws, nor does the NCAA ever explain how or why it could have, yet a case that was limited to its facts is now bandied about as if the State Actor Doctrine is dead, which it is not.²⁵² By extension, the NCAA selectively enforces every NCAA bylaw, because the NCAA's entire enforcement program is not designed to be universally applied, because it only has one investigator for every 10,000 or so college athletes.

Whether a litigant opposing the NCAA is bringing a constitutional or contractual claim, the NCAA will defend on the straw man argument that there is no constitutional right to play any sport, which is besides the point because once a privilege is extended, it must be administered in a nonarbitrary and noncapricious manner. The fact of the matter is the NCAA is the last great unregulated monopoly, that hides under cover of the "[v]eil of [a]mateurism[.]"²⁵³ while making money

²⁵² See *Cohane v. NCAA*, 215 F. App'x 13, 15-16 (2d Cir. 2007) (*Tarkanian* did not hold that the NCAA can never be a state actor), *cert. denied*, 522 U.S. 1022 (2007); see generally Kadence A. Otto & Kristal S. Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS OF SPORT 243, 244 (2008) (describing the flawed premises of *Tarkanian* and the modern realities of college sports).

²⁵³ The phrase "veil of amateurism" was coined by Professors McCormick and McCormick. See McCormick & McCormick, *supra* note 1, at 495; see also Lockhart, *supra* note 5, at 175.

hand-over-fist for itself and its members. Yet the NCAA states it cannot afford to pay for college athletes' disability, health, and life insurance, all the while fixing the price for grants in aid, which are not scholarships, but rather are used to misdirect public perception because only a minority of college athletes receives full grants in aid. And what's the justification for the so-called benefits to college athletes, the majority of whom pay their own way through school? As previously stated, this is not an exhaustive list, but it is exhausting just to look at how much energy is spent trying to hide the reality of college sports, which in Division I has nothing to do with amateurism save for the zero labor costs.

XII. CONCLUSION

It appears the NCAA and its members have been engaged in a decade long conspiracy to subvert the judicial process of the several states, while conspiring to deprive college athletes of due process rights that it has known it should have afforded to them since 1973. This behavior has occurred within the context that the NCAA has assumed a governmental function of regulating between 350,000-400,000 college athletes in any given year without any delegation by the federal or state governments to do so. As a matter of public policy, it is for the federal and state governments to define and regulate amateur sports and to set-up an administrative law system to deal with disputes between the participants. Congress' and the several states' refusal to do so has allowed a monster into the house, and that monster is the NCAA, which presides over a \$60 billion college and university sports industry. There is simply nothing amateur about this system other than the fact the college athletes do not receive pay nor do they receive disability, health, or life insurance. There are no scholarships for athletes, who receive grants in aid, which are currently under investigation by the U.S. Department of Justice for a multitude of reasons. What is important here is that a minority of college athletes gets the so-called *free ride*, and that free ride comes without cab fare home.

Before his death, in an April 1, 2009, article in *USA Today*, the NCAA's late President, Myles Brand, admitted:

There's nothing wrong with being a business like one of the professional leagues. They're very good at what they do. But we have additional constraints. We're in the college milieu, and those who play for us are not professional athletes.

Having said that, I think we can look for and find ways to increase our revenue streams.²⁵⁴

The article noted, "Brand first endorsed a more aggressive commercial approach three years ago and has made the issue a priority for the NCAA and schools. Sports is business, he says, and making money is part of it."²⁵⁵

The NCAA's exploitation of college athletes for its own commercial gain is egregious when the NCAA justifies such exploitation on the basis that the players are student athletes—a term made up by the NCAA that has no legal meaning.²⁵⁶ Moreover, such commercial exploitation *directly contradicts* the overriding purposes and goals of the NCAA, as expressly stated in its own bylaws, which the defendant, the NCAA, trumpeted at the *Oliver* Bench Trial:

The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.²⁵⁷

²⁵⁴ Steve Weiberg & Steve Berkowitz, *NCAA, Colleges Pushing the Envelope with Sports Marketing*, USA TODAY, Apr. 2, 2009, http://www.usatoday.com/sports/college/2009-04-01-marketing-cover_N.htm.

²⁵⁵ *Id.*

²⁵⁶ For a discussion of the ongoing right of publicity lawsuits against the NCAA, where the claim is the NCAA has profited from the likenesses of college athletes, please see Bill Cross, *The NCAA as Public Enemy Number One*, 58 KANSAS L. REV. 1221 (2010).

²⁵⁷ DIV. I MANUAL, *supra* note 6, art. 1.3.1, at 1.

My guess is that the hundreds of thousands of college athletes would be happy to compete for free, as they do now, and they would also be perfectly happy to have corporate America stop profiting off of their amateur sports. So who will give amateurism back to the college athletes, Congress? If not now, when?²⁵⁸

²⁵⁸ In the meantime, how about investigating the NCAA's charitable tax exemption, to which it is legally not entitled, and maybe sending it an invoice for its past unpaid taxes? Ditto to the Division I Athletic Conferences, from which the Division I members derive more revenue than they do from the NCAA directly.

XIII. APPENDIX—*OLIVER v. NCAA* POST-TRIAL BRIEF†

Pursuant to this Court's Post-Trial Order, the plaintiff, Mr. Andrew A. Oliver ("AAO" or "Plaintiff"), respectfully submits to this Court and to the defendant, the National Collegiate Athletic Association ("NCAA" or "Defendant"), his proposed Findings of Facts and Conclusions of Law, as follows:

A. *Proposed Findings of Fact*—

At the Bench Trial hereof, the Plaintiff presented direct examination testimony of the Plaintiff, his father, Mr. David M. Oliver, and his expert witnesses, Michael E. Murman, Esquire, Professor Richard T. Karcher, and Mr. Marc S. Isenberg; in addition, he presented cross-examination testimony of the Defendant via its witnesses, Mr. S. David Berst, Jr. (trial deposition), Mr. David Price (trial deposition), Ms. Rachel Newman Baker (both trial deposition and trial testimony), John B. Shukie, Esquire (both trial deposition and trial testimony), Ms. Jennifer L. Henderson, Esquire (both trial deposition and trial testimony), Ms. Carol Iwaoka (trial testimony), Mr. Kevin Lennon (trial testimony), and its expert witness, Alvin E. Mathews, Jr., Esquire (trial testimony); likewise, he presented cross-examination testimony of Oklahoma State University ("OSU") via its witnesses, Mr. Michael Holder (trial deposition), Mr. Frank Anderson (trial deposition), J. Scott Williams, Esquire (trial deposition), and Benjamin Dyson, Esquire (trial deposition); finally, the Plaintiff's Exhibits 1–51 (not including Exhibit 35) were admitted into evidence. This evidence proved the following:

1. The Parties—

The Plaintiff is a resident of Erie County, Ohio. (Plaintiff's Trial Testimony)

The Defendant is an unincorporated business association, with its principal place of business being located within Marion County, Indiana, but which has members who are domiciled in the State of Ohio,

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and which does business within the State of Ohio, and which is a citizen of the State of Ohio. (NCAA Trial Testimony.)

2. The Related Party—

OSU is the state university of Oklahoma, with its principle place of business being located within Payne County, Oklahoma. (OSU Trial Depos.)

3. The Relationship Between the Parties—

The Plaintiff graduated from Vermillion High School in 2006, where he was a member of, and was the primary pitcher for, its baseball team, the “Sailors,” and he is currently in his junior year of college at OSU, where he has been a member of, and is the primary pitcher for, its baseball team, the “Cowboys,” since starting at OSU in late August of 2006 on a full scholarship. (Plaintiff’s Trial Testimony.)

Prior to graduation from Vermillion High School, the Plaintiff was scouted and solicited by OSU within the State of Ohio, and he thereafter was offered by, and signed a contract with, OSU in the State of Ohio to attend the same. (Plaintiff’s Trial Testimony.)

OSU is a member of, and agent for, the Defendant NCAA, which constitutes a contractual relationship, and OSU is subject to, and obligated to enforce as the Defendant NCAA’s agent, its constitution, bylaws, regulations, and rules. (OSU Trial Depos, Plaintiff’s Exhibit 44.)

The Plaintiff has a contractual relationship with OSU via his National Letter of Intent, via his annual Statements of Financial Aid, and via his status as a student in good standing. (Plaintiff’s Trial Testimony, Plaintiff’s Exhibit 31.)

The Plaintiff’s rights to due process on campus are governed and regulated by OSU’s Office of Student Judicial Affairs, which enforces its Student Code of Conduct. (Plaintiff’s Trial Testimony, Plaintiff’s Exhibit 33.)

However, according to OSU, it's athletic policies and procedures did not apply to the Plaintiff, and, in fact, it utilized no policies and procedures at all in its investigation of him. (OSU Trial Depos., Plaintiff's Exhibit 4.).

The Plaintiff has a contractual relationship with the Defendant NCAA via his National Letter of Intent as well as his Student-Athlete Statement, and the Plaintiff is a third-party beneficiary to the contractual relationship between the Defendant NCAA and OSU. (Plaintiff's Trial Testimony, NCAA Trial Depos. & Testimony, Plaintiff's Exhibits 31, 34 & 44.)

4. The Scope of the Legal & Sports Employment—

Sometime in late January or early February 2006, the Plaintiff terminated Sosnick Cobbe Sports as his sports advisors, and he then retained Robert M. Baratta, Esquire ("RMB"), Tim Baratta, Esquire, a.k.a. Ertemio R. Baratta, Esquire ("TB"), and Icon Sports Group, d.b.a. Icon Law Group ("Icon Sports"), as his sports advisors and attorneys. (Plaintiff's and his father's Trial Testimony.)

Thereafter, at all times relevant herein, RMB, TB & Icon Sports were employed to represent the Plaintiff as identified in their letter of February 14, 2006 as well as in their initial marketing materials that they provided to the Plaintiff at their first meeting prior to that date;²⁵⁹ however, there is no written contract between them. (Plaintiff's and his father's Trial Testimony.)

²⁵⁹ In its web page materials, which are admitted in the Defendant's Exhibits, Icon Sports stated that:

WE WILL NOT JEOPARDIZE A PLAYER'S ELIGIBILITY.

Several ICON partners were themselves college baseball players, so we know first hand what an outstanding opportunity college baseball presents. We always conduct ourselves within the NCAA's allowed capacity as each family's "advisor," and can ensure that all athletes who deal with ICON will navigate the draft with their eligibility intact.

Available at www.teamicon.net (last visited June 4, 2008.).

Since this dispute became public on June 9, 2008, Icon Sports has taken down its web page, which is no longer accessible online. See www.teamicon.net (last visited June 21, 2008.).

RMB and Baratta & Baratta's, d.b.a. Baratta Partners ("B&B"), letter of February 6, 2006, is a fictitious and fraudulent document that was never communicated to the Plaintiff at any time before May 12, 2008. (Plaintiff's and his father's Trial Testimony.)

The Plaintiff terminated the RMB, TB, B&B & Icon Sports on or about March 31, 2008. (Plaintiff's and his father's Trial Testimony.)

After the termination of RMB, TB, B&B & Icon Sports, the Plaintiff then retained the Boras Corp. as his sports advisors and attorneys, which relationship continues to this day. (Plaintiff's and his father's Trial Testimony.)

5. Overview—

The Plaintiff was referred sometime about early-to-mid-January 2006 to Icon Sports by the coach of his summer AAU baseball team, the Midland Redskins, in Cincinnati, Ohio, on the basis that it was a reputable sports management firm that specialized in baseball players, who represented Ken Griffey, Jr. and Cameron Maybin, among others. (Plaintiff's and his father's Trial Testimony.)

In late January or early February 2006, RMB & TB first met with the Plaintiff and his father, Mr. David M. Oliver, at the Oliver family home in Vermilion, Ohio. (Plaintiff's and his father's Trial Testimony.)

At that initial meeting, RMB & TB provided the Icon Sports initial marketing materials referred to above, and they represented that they and Icon Sports were experts in baseball sports management and at complying with the Defendant NCAA's constitution, bylaws, regulations, and rules, which is explained in detail in these marketing and web materials. (Plaintiff's and his father's Trial Testimony.)

At that initial meeting, RMB & TB proposed providing sports advisory, investment, legal, and marketing services, among others, they told the Plaintiff and his father that they would not charge for these services, and they told the Plaintiff and his father that they would charge three (3%) of any baseball contract entered into by the Plaintiff, and twenty-five (25%) of any endorsement contract entered into by the

Plaintiff—none of which was ever put into writing (as such, no legal contract was ever entered into in Ohio at that time, since the Ohio Statute of Frauds voids such unwritten agreements; to the extent that this arrangement would otherwise violate any of the Defendant NCAA's constitution, bylaws, regulations, or rules, it is void *ab initio* under Ohio law). (Plaintiff's and his father's Trial Testimony.)

Thereafter in 2006, RMB, TB & Icon Sports did nothing for the Plaintiff over the next several months other than providing him information that they had prepared for themselves, drafting a letter for the Plaintiff's father to send to Sosnick Cobbe Sports, checking in by telephone, and coming to watch the Plaintiff play baseball, when they were in Cleveland visiting other clients or prospects. (Plaintiff's and his father's Trial Testimony.)

In the June 2006 MLB amateur baseball draft, on or about his graduation from Vermilion High School, the Plaintiff was drafted in the seventeenth (17th) round by the Minnesota Twins, which then became a "Summer Draft & Follow," where the Twins continued to evaluate the Plaintiff over the Summer of 2006, and where they stated that they would make him a contractual offer at the end of that Summer. (Plaintiff's and his father's Trial Testimony.)

During the Summer of 2006, RMB, TB & Icon Spots continued the same level of communication as before. (Plaintiff's and his father's Trial Testimony.)

At the end of the Summer of 2006, the Minnesota Twins met with the Plaintiff and his father at the Oliver family home before the Plaintiff left for his freshman year of college, that meeting was attended by TB—at TB's own request, the Twins' offer was for \$390,000, and the Plaintiff rejected that offer on the advice of his father and chose to attend OSU, where he had already signed a Letter of Intent the previous Fall of 2005 for a full scholarship. (Plaintiff's and his father's Trial Testimony, Plaintiff's Exhibit 31.)

As a result of taking the amateur route and starting at OSU, the Plaintiff would and will not be eligible for the MLB amateur baseball draft again until his junior year of college in June of 2009 (RMB, TB & Icon Sports had advised the Plaintiff to attend a community college, so

that he would be eligible for the draft the following year). (Plaintiff's and his father's Trial Testimony.)

Thereafter, the Plaintiff played his freshman and sophomore years for OSU Cowboys, and RMB, TB & Icon Sports continued the same level of communication as before. (Plaintiff's and his father's Trial Testimony.)

From the time that they were retained until the time that they were terminated, RMB, TB, B&B & Icon Sports, provided absolutely nothing of value to the Plaintiff—including providing no advice of any value to him; instead, everything that they did was overhead to them expended on trying to keep the Plaintiff as a client, i.e., client development. For instance, in the Spring of 2007, TB reviewed a one-page apartment lease for the Plaintiff, but since he was not licensed to practice law in Oklahoma, there was no value to such a review, since it constituted the unauthorized practice of law. At no time up until they were terminated did RMB, TB, B&B & Icon Sports send the Plaintiff an invoice for any claimed services performed for the simple fact that no services of any value were ever performed at any time. (Plaintiff's and his father's Trial Testimony.)

6. Termination and Misconduct of RMB, TB, B&B & Icon Sports—

As mentioned above, the Plaintiff decided to terminate RMB, TB, B&B & Icon Sports on March 31, 2008, and he thereafter retained the Boras Corp.; the reason for this change was that the Plaintiff wanted nationally known, preeminent baseball sports advisors and attorneys, rather than a lesser known group, such as them. (Plaintiff's and his father's Trial Testimony.)

The Plaintiff communicated this termination to RMB on March 31, 2008, and thereafter, RMB tried to reconnect with the Plaintiff and his father on several occasions; when that was unsuccessful, he tried to use Cameron Maybin as an intermediary, which was also unsuccessful, because the Plaintiff had no wish to revisit his decision to switch to the Boras Corp., which decision he considered to be final. (Plaintiff's and his father's Trial Testimony.)

On or about mid-April 2008, the Plaintiff received a letter and one (1) page invoice, dated March 31, 2008, from RMB & B&B for \$113,750.00 (without any detail or time entries), with a threat to file suit if the invoice was not paid within twenty-one (21) days; this was the first time that the Plaintiff had ever even heard of B&B. (Plaintiff's and his father's Trial Testimony.)

This invoice was supposedly for legal services rendered by New Jersey and New York lawyers to the Plaintiff, an Ohio resident, in Ohio and in Oklahoma, where RMB, TB & B&B were not licensed or authorized to practice law. (Plaintiff's and his father's Trial Testimony.)

Thereafter, the Plaintiff took this invoice to his OSU Cowboys coach, OSU athletic compliance office, and to the Boras Corp. (Plaintiff's and his father's Trial Testimony.)

On or about April 22, 2008, RMB & B&B sent a dunning letter to the Plaintiff with a further threat to file suit for collection of this bogus invoice. (Plaintiff's and his father's Trial Testimony, Murman Trial testimony.)

On or about April 23, 2008, the Plaintiff's attorneys from the Boras Corp. sent a letter to RMB & B&B of exactly two (2) sentences inquiring as to the above-referenced invoice. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony.)

Thereafter, the Plaintiff retained Michael E. Quiat, Esquire ("Attorney Quiat") to represent him in regards to this bogus invoice and other issues related to RMB, TB, B&B, Icon Sports, and the Defendant NCAA. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony.)

Attorney Quiat requested on May 2, 5 & 7, 2008 that RMB & B&B provide the contract and time records supporting this bogus invoice. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony.)

On May 2, 2008, RMB took the position that the Defendant NCAA's memo, dated October 2, 2007, regarding "Information Regarding the 2008 Major League Baseball (MLB) First-Year Player Draft,

Agents, and Tryouts,” on page three (3), at paragraph seven (§ 7), required the Plaintiff to pay this bogus invoice, because “it is important to note that in order to maintain your eligibility at an NCAA school, if you receive assistance from an advisor, you will be required to pay that advisor at his or her normal rate for such services.” *Id.* (Plaintiff’s and his father’s Trial Testimony, Murman’s Trial Testimony, NCAA Trial Depos. & Testimony.)

However, nowhere in the Defendant NCAA’s constitution, by-laws, regulations, or rules on amateurism does it require such payments to be made to sports advisors, and the aforementioned October 2, 2007 Memo is both not a correct statement of its constitution, bylaws, regulations, or rules, as well as not a part of the Plaintiff’s contract with OSU and the Defendant NCAA, because it was never given to him, and because he never signed or agreed to be bound by the same. (Plaintiff’s and his father’s Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff’s Exhibit 44.)

In addition, if any “assistance” had been provided, which none had to that date, RMB, TB, B&B & Icon Sports would have been required to have invoiced for the same on a periodic basis, which they never did, because absolutely no assistance of any kind was ever provided to the Plaintiff. (Plaintiff’s and his father’s Trial Testimony, Murman Trial Testimony.)

In a conversation between RMB, TB & Attorney Quiat on May 7, 2008, Attorney Quiat told them that the Plaintiff did not have the amount of money requested, or anything remotely close to that amount, and they then suggested that the Plaintiff should request the Boras Corp. or OSU alumni to provide these funds in order to avoid problems with the Defendant NCAA—which was a not so veiled threat. (Plaintiff’s and his father’s Trial Testimony, Murman Trial Testimony.)

On May 12, 2008, RMB & B&B sent Attorney Quiat a letter dated that same day as well as a supposed contract, dated February 8, 2006. The contract is a fictitious document as well as a fraud on its face, given the February 14, 2006 Icon Sports correspondence mentioned above. The letter laundry listed six (6) items of so-called assistance, none of which were either performed for the Plaintiff or provided him with any actual assistance that would have been compensable. To

date, RMB & B&B have never produced any time records supporting this bogus invoice. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Testimony.)

On May 16, 2008, RMB telephoned Attorney Quiat and told him that unless B&B was paid on its invoice, he would contact the Defendant NCAA and ask it to investigate the Plaintiff, and he opined that the Defendant NCAA would "come down hard" on him. In addition, RMB stated that he had already contacted ESPN, and that the network was interested in doing a story on this fee dispute on its "Outside the Lines" program. Also, RMB told Attorney Quiat that he had incriminating evidence to the effect that the Plaintiff had asked him for some baseball equipment, which he had not provided, but that he suspected that the Boras Corp. had, even though he had no evidence to support that suspicion. Finally, RMB again threatened to file suit to collect on this bogus invoice. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony.)

On May 19, 2008, RMB e-mailed Attorney Quiat to again implicitly threaten the Plaintiff as well as the Boras Corp. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony.)

On May 19, 2008, RMB & B&B mailed, faxed, and e-mailed a letter to the Defendant NCAA complaining about their own client, the Plaintiff, and reporting potential NCAA violations by the same, which they copied to three (3) OSU officials. In this letter, RMB & B&B, in the second paragraph notified the Defendant NCAA that they had been the Plaintiff's legal advisors and counselors during all relevant times. In the third paragraph, RMB & B&B made knowingly false accusations, which even if true would be protected by the attorney-client privilege and therefore could not have been disclosed in any case. In the fifth and sixth paragraphs, RMB & B&B falsely represented the status of the supposed February 2006 contract as well as the truth of whether or not any monies were legally due to them. In the seventh paragraph, RMB & B&B accused the Plaintiff of violating the Defendant NCAA's constitution, bylaws, regulations, and rules by not paying their bogus invoice. RMB & B&B also accused the Boras Corp. of providing unpaid assistance, without any proof or knowledge of whether this was true or not, and they requested that the Boras Corp. be investigated by the De-

fendant NCAA. In the last paragraph, RMB & B&B copied this letter to OSU Cowboys' coach and compliance officers, and they again asked the Defendant NCAA to investigate the Plaintiff, because his "failure to pay our fee for services rendered is a continuing violation of NCAA Rules."²⁶⁰ (Plaintiff's and his father's Trial Testimony, NCAA Trial Testimony, OSU Trial Depos., Plaintiff's Exhibits 6 & 37.)

Attorney-client fee disputes are confidential and secret and not subject to disclosure outside of arbitration or litigation, privileged communications may only be used by an attorney to the extent absolutely necessary in arbitration or court to advance or defend a claim against or by a client, and an attorney is not allowed to extort payment of legal fees—whether legitimately owed or not—by disclosing confidential or secret information, by threatening to disclose the same, or by seeking to destroy a client's career in retaliation for not paying what the attorney arbitrarily decides—without any time records to support—is owed to him. (Murman Trial Testimony.)

Thereafter, the Defendant NCAA initiated an investigation of the Plaintiff's amateur status, its agent, OSU joined in this investigation, they interviewed the Plaintiff, his father, and RMB & TB, among others, towards the end of May 2008, and they thereafter indefinitely suspended the Plaintiff's eligibility to play baseball as of May 31, 2008, which greatly harmed the Plaintiff, which caused OSU Cowboys to lose their NCAA Division I Regional Tournament against the Wichita State Shockers (the Cowboys were the top seed), which caused OSU Cowboys to lose their chance to play in the NCAA Division I Super Regional Tournament against the Florida State Seminoles, and which thus caused OSU Cowboys to lose their chance to play in this year's College World Series. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 2, 8 & 22.)

Thereafter, in an attempt to cover-up his misconduct, RMB falsely "denied that he reported [the Plaintiff] to the NCAA[,] or that he did anything to cause him to be declared ineligible. 'That's not true,' [RMB] said. '(NCAA officials) reached out to us and we responded.'"

²⁶⁰ The Barattas have since withdrawn all statements made to the Defendant NCAA by their letter affidavit, dated November 6, 2008. (Plaintiff's Exhibit 37.)

Liz Mullen, *Boras Corp. and Baratta Differ on Reason Oklahoma State Pitcher Ineligible*, SPORTS BUSINESS DAILY, Jun. 5, 2008, at ____.²⁶¹

However, RMB, TB & B&B's out-of-state attorney, Andrew J. Entwistle, Esquire, has essentially admitted that they had been extorting the Plaintiff, to wit: "All Andy had to do was pay the bill and all of this could have been avoided." Dan Gilles, *Barattas Shocked by Oliver's Lawsuit*, LORAIN MORNING JOURNAL, July 8, 2008, at ____ (statement of Andrew J. Entwistle, Esquire).²⁶²

The Plaintiff is one of the most talented college baseball players in the country, he was a first-team All-Big 12 Conference selection last year, he was a member of the U.S. Baseball National Team this past Summer, which won the F.I.S.U. World Championship of Baseball (gold medal), and he was expected to be a first (1st) round draft pick in June of 2009 before his eligibility was revoked.²⁶³ (Plaintiff's and his father's Trial Testimony.)

Before RMB, TB & B&B's aforementioned misconduct occurred, the Plaintiff enjoyed an impeccable reputation both on and off the baseball field; however, that reputation has now been greatly tarnished, and the damage to the Plaintiff's reputation is continuing and ongoing. (Plaintiff's and his father's Trial Testimony; OSU Trial Depos.)

²⁶¹ Available at www.sportsbusinessdaily.com/article/121370.

²⁶² available at www.morningjournal.com/site/index.cfm?newsid=19836174&BRD=1699&PAG=461&dept_id=566374&rft=8.

²⁶³ The Plaintiff went 7-2 with a 2.20 ERA in 15 appearances, and he was a first-team All-Big 12 Conference selection for Oklahoma State University in 2008. He led the Cowboys with 96 strikeouts in 98.1 innings of work, and his opponents hit just .211 against him. Prior to that, the Plaintiff won the Lorain County Mr. Baseball award in 2006 at Vermilion High School, after going 6-0 with a 0.40 ERA and 108 strikeouts in 52 2/3 innings. See Shaun Bennett, *Pitcher in a Pinch: Former Vermilion Star Sues Over Suspension*, ELYRIA CHRONICLE-TELEGRAM, July 13, 2008, at A-1, available at www.chroniclet.com/2008/07/13/pitcher-in-a-pinch-former-vermilion-star-sues-over-suspension_122/.

7. Misconduct of the Defendant NCAA and its Agent, OSU, and their Illegal as well as Arbitrary and Capricious Actions

According to OSU, the investigation resulting from RMB & B&B's May 19th letter was initiated, directed, and controlled, by the Defendant NCAA, but which was joined by its agent, OSU. (NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 2 & 31.)

Sometime during the week of May 19, 2008, OSU retained the outside law firm of Bond, Schoeneck & King, P.L.L.C., and its paralegal, Mr. Christopher D. Schoemann, who limit their practice to NCAA compliance and infraction matters, supposedly to represent both the Plaintiff and OSU in this investigation.²⁶⁴ (Plaintiff's and his father's Trial Testimony, OSU Trial Depos.)

Under OSU's Student Code of Conduct, the Plaintiff had a right to the following: "Accused students have the right to: 1. a written notice of the alleged violation(s); 2. have no code violation assumed until proven; 3. a timely hearing; 4. be accompanied by an adviser. The adviser is limited to advising the student and may not present the case, question relevant parties, or make statements during the proceedings; 5. review the evidence; 6. question his/her accuser, either directly or indirectly, at the discretion of the hearing panel chair; 7. question witnesses, either directly or indirectly, at the discretion of the hearing panel chair; 8. present material witnesses; (those with first hand knowledge of the incident); 9. waive his/her right to a formal hearing and have the matter resolved informally; 10. a written notification of the outcome of the hearing; 11. an avenue for appeal from a formal hearing." OSU Student Code of Conduct Rule IV(B). (Plaintiff's Exhibit 33.)

However, the Defendant NCAA's agent, OSU, did not allow the Plaintiff any of these due process rights contained in its Student Code of Conduct or in any other policies or procedures in regards to its joint investigation of him: There was no written notice provided of what he was alleged to have done wrong, he was presumed guilty rather than

²⁶⁴ Mr. Schoemann identifies himself as the firm's director of NCAA Compliance Services, but he is not licensed to practice law.

innocent, there was no hearing, no advisor, no opportunity to review evidence, no opportunity to question accusers or witnesses, no opportunity to present witnesses or other evidence, no written notice of the outcome of the non-existent hearing, and no avenue for appeal. (Plaintiff's and his father's Trial Testimony, Plaintiff's Exhibits 4 & 33.)

Instead, the Defendant NCAA's agent, OSU, did the following, via its in-house attorney and compliance officer, J. Scott Williams, Esquire, and its outside counsel, Bond, Schoeneck & King, P.L.L.C., and Christopher D. Schoemann, Esquire, during the week of May 27, 2008, all of which greatly prejudiced the Plaintiff:

- It communicated directly with the Plaintiff, whom it knew to be represented by Attorney Quiat, which violated the anti-contact ethics rules applicable in Oklahoma and every other state. OKLA. R. PROF'L CONDUCT R. 4.2. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos);
- It advised the Plaintiff to sign a "Release for Records," which also violated the anti-contact rule. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos., Plaintiff's Exhibit 7);
- It fraudulently represented to the Plaintiff and his father that expert outside counsel had been retained to represent both OSU and the Plaintiff in the NCAA investigation, which was untrue, since they were adverse, and since Bond, Schoeneck & King, P.L.L.C. and Mr. Schoemann were really retained to represent OSU; in fact, OSU went so far as to tell the Plaintiff that there was no need for him to have Attorney Quiat involved, since this expert counsel would represent his interests, as well. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos);
- It fraudulently concealed the fact from the Plaintiff that it was investigating him along with the Defendant NCAA, that the Defendant NCAA was implicitly investigating it, as well as the fact that the Plaintiff's athletic eligibility was at risk, and that it might revoke the same. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos);
- It illegally obtained and used the Plaintiff's confidential attorney-client privileged information in violation of applicable laws

and rules. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos); and

- It fraudulently led the Plaintiff to believe that it was on his side, when it had a material conflict of interest, and when its primary interest was in protecting itself against a major infraction penalty that might be imposed by the Defendant NCAA rather than protecting the Plaintiff's athletic eligibility. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, OSU Trial Depos.)

In addition, the Defendant NCAA did at least the following, via its in-house attorneys and compliance officers, starting the week of May 19, 2008, and continuing in some part to this Day:

- It communicated directly with the Plaintiff, whom it knew to be represented by Attorney Quiat, which violated the anti-contact ethics rules applicable in Oklahoma and every other state. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Depos. & Testimony);
- It failed to effectively and legally give the Plaintiff the notice required by NCAA Bylaw 32.3.7.1.²⁶⁵ (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Depos. & Testimony, Plaintiff's Exhibit 15); and
- It illegally obtained and used the Plaintiff's confidential attorney-client privileged information in violation of applicable laws and rules. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Depos. & Testimony.)

In Gestapo-like fashion, the Defendant NCAA, and its agent, OSU, interviewed the Plaintiff, without an attorney present, on Thursday evening, May 29, 2008, from approximately 8:30 p.m. to until

²⁶⁵ The bylaw provides that:

When an enforcement representative requests information that could be detrimental to the interests of the student-athlete or institutional employee being interviewed, that individual shall be advised that the purpose of the interview is to determine whether the individual has knowledge of or has been involved directly or indirectly in any violation of NCAA legislation.

NCAA Bylaw 32.3.7.1.

Since the Defendant NCAA was required to communicate only through Attorney Quiat, no informed notice or consent given.

sometime before or after midnight, when the Plaintiff was supposed to pitch in the Regional Tournament on May 30th, which additionally violated the anti-contact rule; and they then interviewed the Plaintiff's father directly thereafter until early morning on the morning of May 30th. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos.)

The Defendant NCAA and its agent, OSU, apparently debated the Plaintiff's eligibility the morning and early afternoon of May 30, 2008, and, apparently, they both determined that some amateurism violations had occurred (the Defendant NCAA determined this before OSU did), but OSU was asking the Defendant NCAA to "reinstate" the Plaintiff before he was ever even suspended. (NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibit 22.)

At about mid-afternoon on Friday, May 30, 2008, just a few hours before the Plaintiff was to pitch for the Cowboys in the Regional Tournament, the Defendant NCAA's agent, OSU, met with him and his father in his coach's office to tell him that his athletic eligibility had been revoked, and OSU led the Plaintiff to believe that this revocation had been done by the Defendant NCAA, directly, but, apparently, it was done indirectly by its agent, OSU, after the Defendant NCAA had reached its determinations; if OSU had not followed the Defendant NCAA's findings, that could have subjected the entire university to a major infraction, which is punitive in nature. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 2 & 22.)

The Defendant NCAA denies that it had anything to do with this suspension, and it has stated that its agent, OSU, acted alone, all of which is patently untrue; moreover, upon information and belief, OSU only suspended the Plaintiff's athletic eligibility at the express instruction and implicit threat by the Defendant NCAA to bring a major infraction case against it.²⁶⁶ (Plaintiff's and his father's Trial Testimony,

²⁶⁶ In a recent interview, the Defendant NCAA admitted that it asks schools to either assist or conduct investigations on its behalf. David Wharton, *NCAA Officials Answer Critics*, L.A. TIMES, July 14, 2008, at ___, available at www.latimes.com/news/la-sp-ncaa14-2008jul14,0366480.story. Moreover, it bragged about what it "calls 'tools of authority,' its bylaws requiring cooperation from coaches, administrators and athletes

NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 2 & 22.)

There was no formal written document addressed to the Plaintiff evidencing the Defendant NCAA's and/or its agent's, OSU, indefinite suspension of the Plaintiff, but he has been told by OSU that the basis for this suspension is that he had violated NCAA Bylaw 12.3.1²⁶⁷ by allowing RMB, TB, B&B, and/or Icon Sports, to make contact by telephone with the Minnesota Twins on his behalf following the 2006 MLB amateur baseball draft, and that he had violated NCAA Bylaw 12.3.2.1²⁶⁸ by allowing the Defendant TB to be present at his home, when a representative from the Minnesota Twins tendered a professional contract to him.²⁶⁹ (Plaintiff's and his father's Trial Testimony, OSU Trial Depos., Plaintiff's Exhibits 28.)

This is amazing, since a client does not "allow" an attorney to do anything, but rather an attorney advises a client, and where a client follows the lawyer's advice, the client generally has an absolute "advice of counsel" defense, which would be the case here.

still on the team. *Id.* This article goes on to describe the reign of fear that the NCAA uses to control its members. *Id.*

²⁶⁷ This bylaw provides that:

An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing.) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

NCAA Bylaw 12.3.1.

²⁶⁸ This bylaw provides that:

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

NCAA Bylaw 12.3.2.1.

²⁶⁹ Ironically, while an individual may not have an attorney negotiate for him, he is allowed to have OSU negotiate for him, which would create a conflict of interest, and which would possibly subject the university to liability, if it was negligent in doing so. NCAA Bylaw 12.2.4.3. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, Plaintiff's Exhibit 44.)

Even more amazing, the Defendant NCAA, and its agent, OSU, apparently do not take into account the player's level of intent, if any, for any violation, and they do not take into account any defenses that a player may have, when they make their initial determination to suspend eligibility. In fact, the Defendant NCAA, and its agent, OSU, do not inform a player in writing of the charges against him, they do not provide him any forum in which to present evidence or otherwise defend against the charges, and they simply make their findings as if the player has no rights at all. Thus, the Defendant NCAA, and its agent, OSU, provide absolutely zero procedural due process to a player before suspending him. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos.)

Further amazing is the fact that in this Case, the Defendant NCAA, and its agent, OSU, suspended the Plaintiff before they even finished their investigation. (NCAA Trial Depos. & Testimony, OSU Trial Depos.)

Outrageously, the Plaintiff does not even have standing to request reinstatement by the Defendant NCAA of his athletic eligibility, which can only be initiated by the Defendant NCAA's agent, OSU—his prosecutor, judge, and jury (along with the Defendant NCAA); moreover, the Defendant NCAA requires any player asking for reinstatement to execute a "Buckley Statement," whereby the player has to waive his rights under the Family Educational Rights and Privacy Act, so that the Defendant NCAA can disclose the player's confidential records to the media, among others, which is unconscionable. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 44.)

On August 18, 2008, the Plaintiff was unconditionally reinstated by the Defendant NCAA as a result of this Court's TRO, dated August 15, 2008; amazingly, however, the Defendant NCAA testified at Trial that this letter was a fraud and had not actually reinstated the Plaintiff as ordered by this Court. (NCAA Trial Testimony, Plaintiff's Exhibit 5.)

In October 2008, OSU filed for reinstatement of the already reinstated Plaintiff; in December of 2008, the Defendant NCAA suspended the Plaintiff's eligibility for one (1) year and charged him a year of eligibility, it reconsidered and reimposed the same penalty, and upon

OSU's appeal thereof, the penalty was reduced to a seventy percent (70%) suspension with no loss of eligibility; all of this was accomplished over the objection of the Plaintiff. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 28 & 39–43.)

In this Case, the Plaintiff never hired an “agent,” instead, he hired lawyers and sports advisors, and he never had a legally enforceable agreement with RMB, TB, B&B, and/or Icon Sports, that would otherwise violate NCAA Bylaw 12.3.1. (Plaintiff's and his father's Trial Testimony, Murman Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos.)

In this Case, the Plaintiff certainly retained lawyers to represent him, attorneys in Ohio are subject to the exclusive regulation of the Ohio Supreme Court, OHIO CONST. art. IV, § 4.02(B)(1)(g), and the Defendant NCAA, and its agent, OSU, have absolutely no authority whatsoever to promulgate a rule that would prevent a lawyer—legally retained under the NCAA's bylaws—from competently or zealously representing his or her client. Thus NCAA Bylaw 12.3.2.1 is void, because it is against the public policy of the State of Ohio as well as every other state in this Union. This rule is also arbitrary and capricious, because it does not impact a player's amateur status whatsoever, but, instead, limits the player's ability to effectively negotiate a contract that the Defendant NCAA allows the player to negotiate. (Murman & Karcher Trial Testimony.)

In this Case, the incidents apparently alleged by the Defendant NCAA, and its agent, OSU, occurred prior to the Plaintiff even beginning college, and neither of them paid any consideration to the Plaintiff that would even support some sort of agreement for them to regulate his conduct at that time. (Plaintiff's and his father's Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos., Plaintiff's Exhibits 44.)

Apart from the arbitrary and capricious actions taken by the Defendant NCAA, and its agent, OSU, as discussed above, they knew or should have known that they had received attorney-client privileged information from RMB & B&B, and they should have known that they could not further solicit attorney-client privileged information from

them, yet they received and solicited further such information regarding alleged conversations and fee disputes that are clearly attorney-client privileged, and they then used this illegally obtained information to initiate an investigation of the Plaintiff that would not otherwise have occurred. (Murman Testimony.)

The Defendant NCAA, and its agent, OSU, knew or should have known that an attorney may not publicize a fee dispute against a client, and they should have known that RMB & B&B were prohibited by the applicable Ohio Rules of Professional Conduct, as well as by similar rules in Oklahoma, New Jersey, and New York, from complaining about their own client as well as from using the Defendant NCAA, and its agent, OSU, to extort money from the Plaintiff.²⁷⁰ (NCAA Trial Depos. & Testimony, Murman Testimony.)

It should have been patently obvious to the Defendant NCAA, and its agent, OSU, that the Plaintiff was the victim of an unethical and unscrupulous attorney and sports advisor, and they had a duty to protect him—not punish him; it is the height of arrogance, and it is *per se* arbitrary and capricious, to punish the Plaintiff, who bears no fault whatsoever—even if the Defendant NCAA’s bylaws were to be upheld in general by this Court. (Plaintiff’s and his father’s Trial Testimony, Murman & Karcher Trial Testimony, NCAA Trial Depos. & Testimony, OSU Trial Depos.)

8. The Defendant NCAA Is Neither a Legitimate Amateur Organization Nor a Legitimate Tax Exempt Organization—

This Court heard all of the Defendant NCAA’s witnesses testify to its supposed bedrock principal of amateur athletics, and the historical reasons for the creation of the organization. (NCAA Trial Testimony.)

²⁷⁰ The Defendant NCAA, and its agent, OSU, should have asked how on Earth a young man could possibly have run up such an alleged bill, what possible services could have been rendered to account for that bill, and they should have asked for detailed time statements, whose non-existence would have immediately shown that the Plaintiff was not in debt to RMB, TB, B&B, and/or Icon Sports.

However, the rules relating to agent, gambling, and amateurism (“AGA”) do not apply to the Defendant NCAA, itself, and only the gambling rule applies to the Defendant NCAA’s members; as such, it seems to be in the business of regulating non-members, while allowing it and its members to do as they please. (NCAA Trial Depos.)

In fact, the Defendant NCAA readily admits that it engages in commercial advertising, branding, promotions, etc., that it takes a five percent (5%) fee off the top, and that it does not distribute this money equally to its members. (NCAA Trial Depos. & Testimony.).

The financials for the Defendant NCAA show that it devotes less than five percent (5%) of its budget for student-welfare, and that it devotes less than one percent (1%) to enforcement, with the vast majority of revenue being returned to its revenue generating Division I members—no different from any commercial sports league. (NCAA Trial Depos. & Testimony, Plaintiff’s Exhibit 11.).

This compares to executive compensation and private jet travel of \$4,485,126, and branding costs of \$5,081,333, which are just slightly less than what the Defendant NCAA spends on enforcement, percentage-wise. (Plaintiff’s Exhibit 32.)

The Defendant NCAA produced no evidence that commercial enterprise is not its *de facto* primary purpose, and the proposition that amateurism tops its list of priorities is demonstratively false, just by looking at its financials. See Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008) (presenting a thorough review of this farce).

9. The Defendant NCAA Selectively Enforces Its Rules in Regards to Baseball Players—

As stated above, the Defendant NCAA allots less than one percent (<1%) of its budget for enforcement, it has just one investigator for approximately every 10,000 student-athletes, and in regards to its AGA division, it has only one investigator for approximately every 120,000 student-athletes. (NCAA Trial Depos. & Testimony.)

For this reason, the Defendant NCAA does not initiate investigations on its own but waits for information to come to it randomly. (NCAA Trial Depos. & Testimony.)

The Defendant NCAA has chosen not to engage in detailed studies regarding agent/amateurism, because of the cost of conducting those studies, even though it has actual notice that almost every baseball student-athlete, who is drafted, has violated its Bylaw 12.3.2.1; in fact, it admitted that the identity and representatives of such players are published annually by *Baseball America*. (NCAA Trial Depos. & Testimony.)

Out of the past decade, it has prosecuted less than a handful of eligibility cases against baseball student-athletes, and then it does not publish the results, so the student-athlete population is not even apprised of this scant attention. (NCAA Trial Depos. & Testimony.)

As testified to Trial, in addition to this lack of notice, the Defendant NCAA made absolutely no effort to educate the Plaintiff as to its rules prior to his matriculation at OSU.

B. Proposed Conclusions of Law—

As this Trial has unfolded, the Plaintiff has been amazed by the Defendant NCAA's behavior and conduct, whereby it seeks to place itself above the law, as if it were the fifty-first (51st) state in the Union that has its own "legislative" process.

Nowhere is that more clear, than the Defendant NCAA's admission that its reinstatement letter did not, in fact, reinstate the Plaintiff— notwithstanding this Court's TRO requiring the same.

The Plaintiff has had a Motion for Contempt pending before this Court since the late Summer, which this Court reserved ruling on by its Order of September 9, 2008. Now that this Court has heard the Defendant NCAA essentially brag about how it circumvented this Court's TRO, which then allowed it to consider OSU's reinstatement request of the supposedly already reinstated Plaintiff, this Court should now issue a show-cause order as to why the Defendant NCAA should not be held in contempt of this Court. (NCAA Trial Testimony.)

1. OSU Is an Agent of the Defendant NCAA, Which Is Responsible for its Actions Within the Scope of the Agency—

As testified to by OSU, when it investigated the Plaintiff and indefinitely suspended his athletic eligibility, it was not proceeding under any OSU policies, procedures, or rules, but rather under those of the Defendant NCAA, which it was obligated to enforce under threat of penalty. (OSU Trial Depos.)

According to its Division I Manual, the Defendant NCAA is “a diverse, voluntary, unincorporated Association of four-year colleges and universities, conferences, affiliated associations and other educational institutions.” NCAA Bylaw 4.02.1. (Plaintiff’s Exhibit 44.)

According to the Defendant NCAA’s Division I Manual:

Legislation governing the conduct of intercollegiate athletics programs of member institutions shall apply to basic athletics issues such as admissions, financial aid, eligibility and recruiting. Member institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.

NCAA Bylaw 1.3.2. (Plaintiff’s Exhibit 44.)

Unincorporated associations are governed by Chapter 1745 of the Ohio Revised Code. *See generally* 6 OHIO JUR. 3D *Associations and Corporations Not for Profit* §§ 1–15 (West 2009) (discussing unincorporated associations).

In *Lyons v. American Legion Post No. 650 Realty Co.*, the Ohio Supreme Court held that:

Section 1745.01 et seq., Revised Code, authorizes suit against an unincorporated association as an entity and in the name by which it is commonly known, and, by the statutory provisions, when this is done any money

judgment recovered must be satisfied out of the property of the association alone and not out of the property of the individual members thereof. A suitor may at his election pursue the statutory remedy provided or he may maintain his action against the individual members of such association.

172 Ohio St. 331, 331, 175 N.E.2d 733, 734 (1961) (Syllabus at ¶ 2).

The *Lyons* Court also held that:

A difference exists between an unincorporated association organized and functioning in business or commerce, where the principles of partnership are applicable, and one organized and conducted for fraternal or social purposes, where the principles of agency obtain. In the latter instance, where an action for damages grounded on negligence is brought against the individual members of such an association to recover for pain and suffering, loss of wages, expenses and wrongful death, any liability there may be attaches only to those members who actively participated in the affair resulting in the claimed injuries.

Id. (Syllabus at ¶ 4).

In *Miazga v. International Union of Operating Engineers, A.F.L.-C.I.O.*, the Ohio Supreme Court held that:

Under the provisions of Sections 1745.01 to 1745.04, Revised Code, a plaintiff who is a member of a labor union which is an unincorporated association can maintain an action against such unincorporated association for the alleged commission of a tort against the plaintiff by the agents of such association acting within the scope of their authority.

2 Ohio St. 2d 49, 49–50, 205 N.E.2d 884, 884 (1965) (Syllabus); *accord Tanner v. Columbus Lodge No. 11, Loyal Order of Moose*, 44 Ohio St. 2d 49, 49, 337 N.E.2d 625, 625 (1975) (Syllabus); *Rine v.*

Sabo, 113 Ohio App. 3d 109, 119, 680 N.E.2d 647, 654 (6th Dist., Lucas 1996) (following *Tanner*).

For these reasons, and in addition to its liability for its own conduct, the Defendant NCAA is liable for any tortious conduct committed by OSU towards the Plaintiff, since OSU was acting as the NCAA's agent in its enforcement of the NCAA's Division I Manual on its student-athletes. This is also why OSU is not a necessary party to this lawsuit, which seeks only breach of contract and tortious interference with contract damages against the Defendant NCAA, itself, in addition to declaratory and injunctive relief against the Defendant NCAA, itself. See OHIO REV. CODE ANN. § 1745.01 (West 2008) (plaintiff may sue association for conduct of its members).

Moreover, if this Court determines that the relationship between the NCAA and OSU is one of partnership with corresponding fiduciary duties, then the Defendant NCAA would be a fiduciary to the Plaintiff, since he is in privity with OSU (independent of any contractual or fiduciary duties owed by the Defendant NCAA to the Plaintiff via his contract or his status as a third-party beneficiary). *Arpadi v. First MSP Corp.*, 68 Ohio St. 3d 453, 454, 628 N.E.2d 1335, 336 (1994) (Syllabus at ¶ 3) ("Those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates. (citation omitted)).

Again, all OSU witnesses testified that they were enforcing the Defendant NCAA's bylaws and not their own rules, and they all testified that they were required to do so by the Defendant NCAA. All OSU witnesses testified that they investigated the Plaintiff at the direction and control of the Defendant NCAA. It is uncontested that OSU did not want to suspend the Plaintiff's athletic eligibility, but that it did so, only after requesting a stay from the Defendant NCAA, and only after the Defendant NCAA determined that there was a violation of its bylaws that required OSU to suspend the Plaintiff or face the consequences of playing an ineligible player.

The Defendant NCAA's witnesses described this as a "choice" that was made by OSU, but the evidence shows that OSU had no choice but to give in to the Defendant NCAA's implied threats. This was not a

choice as that term is understood by the law. (NCAA Trial Depos. & Testimony, OSU Trial Depos.)

2. The Defendant NCAA Owes a Contractual Duty of Good Faith and Fair Dealing to the Plaintiff—

There are direct contractual relationships between the Plaintiff and OSU, the Plaintiff and the Defendant NCAA, and the Defendant NCAA and OSU, as discussed above.

The Defendant NCAA claims that there is no such contract, because the Plaintiff's National Letter of Intent ("NLI") was between him and OSU, and because the Defendant NCAA is not a party to the same. However, this is belied by the cover letter to the same, which is replete with NCAA requirements governing the NLI, which, itself, prohibits the Plaintiff from transferring to another college or university his first year and retaining his NCAA athletic eligibility. The accompanying OSU Financial Aid Agreement Form is likewise replete with NCAA requirements governing it. In fact, the NLI program is administered and regulated by the NCAA, notwithstanding its testimony to the contrary. *See* <http://www.ncaa.org/wps/ncaa?ContentID=269>. (Plaintiff's Trial Testimony, NCAA Trial Testimony, Plaintiff's Exhibit 31.).

The Defendant also claims that its Student-Athlete Statement is only a release, and not a contract, when a release is a form of a contract. (NCAA Trial Testimony.)

Moreover, in ruling on the Defendant NCAA's Motion to Dismiss, this Court implicitly held that the Defendant NCAA was estopped from denying a contract, when it insisted that the Plaintiff was required to exhaust the Defendant NCAA's administrative remedies, which obligation can only arise via contract.

[C]ourts have stated that the only contractual duty owed by institutions and the NCAA to athletes or prospective athletes is the duty of good faith and fair dealing.²⁷¹ In *Hall v. NCAA*, a federal district court held that the NCAA did not violate the covenant of good faith and fair

²⁷¹ Phillip v. Fairfield Univ., 118 F.3d 131, 135 (2nd Cir. 1997.).

dealing implicit in its contract with Hall.²⁷² After a dispute over an NCAA core course requirement, Hall, an incoming scholarship basketball player at Bradley University, sued to enjoin the NCAA from declaring him ineligible, alleging that the NCAA had breached its contract with him.²⁷³ The court found contractual intent through Hall's offer of application and payment to the NCAA Clearinghouse (the organization that determines student-athlete eligibility for the NCAA) and the Clearinghouse's acceptance of his application, but held that the NCAA did not breach this contract because it applied its standards fairly to Hall.²⁷⁴

Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of Bloom v. NCAA*, 59 VAND. L. REV. 905, 921 (2006) (footnotes renumbered).

In addition, while the Defendant NCAA disputes that the Plaintiff is a third-party beneficiary to its contractual relationship with OSU, this Court so found in its ruling on summary judgment, and this represents the law of this Case.

Moreover, substantial evidence was presented at Trial that a supposed primary purpose of the Defendant NCAA is to protect student-athletes, it was formed for that exact purpose, and it derives its tax-exempt status from that purpose. In fact, Defendant NCAA witnesses testified that it had a duty to treat student-athletes in good faith and to deal fairly with them. (NCAA Trial Testimony.) See Ekert, *supra*, at 922–33 (discussing third-party beneficiary status under *Bloom v. NCAA*, 93 P.3d 621 (Colo. Ct. App. 2004), and its progeny).

As such, it is beyond dispute that the implied duties of good faith and fair dealing govern the Defendant NCAA's conduct towards the Plaintiff, which prohibit the Defendant NCAA from acting in an arbitrary and capricious manner towards the Plaintiff.

²⁷² 985 F. Supp. 782, 795 (E.D. Ill. 1997.).

²⁷³ *Id.* at 794.

²⁷⁴ *Id.*

3. The Attorney Compliance Officers Are Subject to the Model Rules of Professional Conduct for the States in Which They Are Licensed and Act—

At Trial, this Court witnessed the most fundamental misunderstanding of a lawyer's role in society, not just by Messrs. Shukie, Williams & Dyson, but by the Defendant NCAA's own expert witness, who seemed completely unaware of the text of the Model Rules, notwithstanding the fact that his entire analysis was based upon his textural reading of Model Rules 4.2 & 4.4. (Mathews Trial Testimony.)

The Preamble to the Model Rules in effect in all relevant states at issue here clearly states that the Rules have global effect. A.B.A. MODEL RULES PROF'L CONDUCT Preamble, at ¶¶ 3 & 5. This principle is repeated in the rule on law related services in non-legal contexts. *Id.* at R. 5.7, cmt. 2.

When the Plaintiff confronted Mr. Mathews with just a selection of the vast authority on this topic contra his stated opinion (Plaintiff's Exhibits 45–50), Mr. Mathews conceded that the ethics rules did, in fact, apply to lawyer conduct outside of actual client representation. (Mathews Trial Testimony.)

In fact, Mr. Mathews conceded that, if this Court found Messrs. Shukie, Williams, and/or Dyson to have acted in a dishonest, fraudulent, deceitful, misrepresentative, manner, then they would have violated the relevant ethics rules. (Mathews Trial Testimony.)

Fortunately, this Court heard from one of the preeminent legal ethics authorities in this state, the Plaintiff's expert witness, and he was unequivocal about the sordid conduct of these attorneys, which he stated should be imputed to their client, their employers, and their principals. The Plaintiff will not belabor the point here, since this egregious conduct has already been well set-out above. (Murman Trial Testimony.)

4. The Defendant NCAA and its Agent, OSU, Acted in an Arbitrary and Capricious Manner Towards the Plaintiff—

Through the evidence adduced at Trial, the Plaintiff proved the following: That the Defendant NCAA, and its agent, the OSU, breached their contractual obligations of good faith and fair dealing at least as follows: (1) by attempting to regulate the Plaintiff's pre-college behavior after-the-fact and without any consideration; (2) by failing to educate the Plaintiff regarding what pre-college behavior might violate the Defendant NCAA's bylaws, regulations, or rules; (3) by failing to offer the Plaintiff any procedural due process prior to suspending him; (4) by failing to complete their investigation before suspending him; (5) by enforcing arbitrary and capricious bylaws, regulations, and rules; (6) by making arbitrary and capricious findings; (7) by failing to take into account the Plaintiff's defenses (to the charges never presented to him); (8) by failing to take into account the Plaintiff's state of mind (to the charges never presented to him); (9) by violating the anti-contact rule; (10) by acquiring, receiving, and soliciting, attorney-client privileged information; (11) by using the Plaintiff's attorney-client privileged information, that was illegally obtained, against him; (12) by illegally attempting to regulate attorneys in the state of Ohio; and (13) by punishing the Plaintiff, when he was without any fault whatsoever. (All Trial Testimony.)

In addition, through the evidence adduced at Trial, the Plaintiff proved the following: That the Defendant NCAA's agent, the OSU, in the course of its agency, further breached its contractual obligations of good faith and fair dealing at least as follows: (1) by violating the anti-contact rule; (2) by advising the Plaintiff to sign a "Release for Records," which also violated the anti-contact rule; (3) by fraudulently representing to the Plaintiff and his father that it had retained expert outside counsel to represent both it and the Plaintiff in the NCAA investigation; (4) by fraudulently concealing the fact from the Plaintiff that it was investigating him along with the Defendant NCAA, that the Defendant NCAA was investigating it, as well as the fact that the Plaintiff's athletic eligibility was at risk, and that it might revoke the same; (5) by fraudulently leading the Plaintiff to believe that it was on his side, when it had a material conflict of interest, and when its primary interest was

in protecting itself against a major infraction penalty that might be imposed by the Defendant NCAA rather than protecting the Plaintiff's athletic eligibility; and (6) by failing to file a reinstatement request with the Defendant NCAA prior to the Plaintiff initially commencing suit against it. (All Trial Testimony.)

Moreover, through the evidence adduced at Trial, the Plaintiff proved the following: That the Defendant NCAA has actual knowledge of the industry practice of disregarding its Bylaw 12.3.2.1, that it has taken little-to-no actions to enforce this rule industry-wide, and that it has only three (3) investigators devoted to the entire topic of amateurism for some 360,000 student-athletes, which gives it no real mechanism to enforce its rules. Here, the only reason that the rule was enforced against the Plaintiff was because his previous attorneys committed legal malpractice and "exploited" him, to use the Defendant NCAA's findings. (NCAA Trial Depos. & Testimony.)

The evidence showed that only one (1) high school baseball player was punished by this rule prior to August 2006, when the alleged violation occurred here, and that punishment was a mere six (6) game suspension. Since then, the Defendant NCAA apparently changed its viewpoint on amateurism, but it admitted that it did nothing to communicate that to the Plaintiff. Moreover, as discussed above, it cannot connect the dots between its rule and how that rule actually fosters amateurism. (NCAA Trial Depos. & Testimony.)

Nothing can be more arbitrary and capricious than selective enforcement, but given that the Defendant NCAA devotes less than one percent (>1%) of its budget to enforcement, one cannot expect anything else. However, the law does not allow the Defendant NCAA to "make an example" of the Plaintiff, simply because it "chooses" not to enforce its rules against all student-athlete baseball players, who it knows are also violating the rule, because it has been told so by every MLB scout that it has talked to, apparently. (All Trial Testimony.)

Finally, if for no other reason, the Defendant NCAA admitted that its role was, in part, to protect student-athletes from exploitation, it admitted that the Barattas exploited the Plaintiff, it admitted that both it and OSU failed in their duties to educate the Plaintiff regarding their rules—and then it punished the victim and nobody else! This is the

very definition of bad faith, which transcends mere arbitrary and capricious behavior, and which requires this Court to permanently reinstate the Plaintiff's athletic eligibility. (NCAA Trial Testimony.)

5. The Defendant NCAA's Bylaws 12.3.2.1 and 19.7 Are Arbitrary and Capricious—

At Trial, the Defendant NCAA could not come up with a single explanation of how its Bylaw 12.3.2.1 promotes amateurism, and it could not come up with a single specific harm that would befall it, if it were required to allow student-athletes the full benefit of legal counsel, when negotiating contracts that the Defendant NCAA allows them and their parents to negotiate. (NCAA Trial Testimony.)

At Trial, the testimony was unrefuted that the Plaintiff and his father are not capable of negotiating professional sports contracts, and the testimony was unrefuted that the Defendant NCAA has no legitimate interest in preventing student-athletes from effectively negotiating contracts that it already allows to be negotiated. In fact, both the Plaintiff's and the Defendant NCAA's expert witnesses testified to the fact that a lawyer following Bylaw 12.3.2.1 would commit legal malpractice. And since the Plaintiff is eligible for the upcoming draft, the failure to invalidate these bylaws will prevent the Plaintiff from, again, effectively negotiating a contract that the Defendant NCAA allows him and his father to negotiate. (Plaintiff's and his father's Trial Testimony, Murman & Karcher Trial Testimony, NCAA Trial Testimony, Mathews Trial Testimony.)

All the Defendant NCAA could say was that this is a "choice," apparently its theme word throughout the Trial, but the Defendant NCAA could not identify any authority that it has to prevent student-athletes from exercising their right to counsel, anymore than the Defendant NCAA could prohibit student-athletes from exercising their rights to freedom of speech. Instead, ironically, the Defendant NCAA said that *its* First Amendment rights would be impacted, if its members did not have the unfettered right to pass rules affecting non-members. But one cannot have it both ways; moreover, the constitutional right of association has nothing to do with an association attempting to exert con-

trol over non-members, who have not been invited to join. (NCAA Trial Testimony.)

At Trial, the Defendant NCAA also admitted that Bylaw 19.7 was designed and implemented to deprive non-member student-athletes of their right of access to the courts, because it does not believe that these non-members should be able to circumvent the so-called administrative processes afforded to its members—and not to the student-athletes, themselves! Even the Defendant NCAA’s own expert witness admitted that if this purpose was proven, it would create a “problem” for the Defendant NCAA vis-à-vis this Court invalidating such a direct attack on the constitutional right of access to the courts and the constitutional delegation of judicial power to the courts of this state. While the Defendant NCAA attempted to explain away that this was a form of member-to-member equalization in order to achieve some sort of remedial fairness, that is what the courts are for, and no amount of justification can save a rule designed with such an illegitimate purpose. (Murman Trial Testimony, NCAA Trial Testimony, Mathews Trial Testimony.)

As this Court may recall, the Defendant NCAA first argued for joinder of OSU in its Motion to Dismiss, because otherwise OSU might not comply with any injunction that this Court might issue, since it was not a party, and due to the negative effects that might befall it under the Defendant NCAA’s Restitution Rule, Bylaw 19.7. The Plaintiff opposed this effort on the basis that the former Defendant OSU, as a member of the NCAA, would be bound by any injunction issued hereby, and that it was thus not a necessary or indispensable party; moreover, the Plaintiff pointed out that the implicit or explicit coercive effect of NCAA Bylaw 19.7 was hardly reason to order joinder, but instead stood for the proposition that this Bylaw should be declared invalid by this Court, because of just this effect argued by the Defendant NCAA. Essentially, the Defendant NCAA has made the Plaintiff’s case for him in regards to the invalidation of this Bylaw—something that it has not admitted in other cases related to this topic.

Nor can the Defendant NCAA’s “Chicken Little” arguments save these facially invalid rules: The Defendant NCAA will not collapse if a line is drawn in the sand that it may not deprive non-member

student-athletes of their right to counsel or access to the courts. The concept of member self-determination does not extend to being able to determine the rights of third-party non-members. Moreover, this Court has personal jurisdiction over the Defendant NCAA, the Plaintiff has standing to challenge these bylaws, and this Court has jurisdiction to declare them invalid. Such a declaration goes to the Defendant NCAA, itself, and is not limited to the geography of this State. As such, there would be no disparity in enforcement: Instead, there would be equal rights to counsel and access to the courts nationwide, which are principles upon which this Country was founded. Needless to say, Public Policy is on the Plaintiff's side. (NCAA Trial Testimony.)

6. The Plaintiff Is Entitled to Declaratory Relief—

Civil Rule 57 states as follows:

The procedure for obtaining a declaratory judgment pursuant to Sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may advance on the trial list the hearing of an action for a declaratory judgment.

OHIO R. CIV. P. 57.

[C]ourts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

OHIO REV. CODE ANN. § 2721.02(A) (West 2009).

The Plaintiff respectfully requests that this Court enter a declaratory judgment that the Defendant NCAA's Bylaw 12.3.2.1²⁷⁵ is unenforceable for the following reasons:

First, the Plaintiff certainly retained lawyers to represent him, attorneys in Ohio are subject to the exclusive regulation of the Ohio Supreme Court, OHIO CONST. art. IV, § 4.02(B)(1)(g), and the Defendant NCAA, and its agent, OSU, have absolutely no authority whatsoever to promulgate a rule that would prevent a lawyer—legally retained under the NCAA's bylaws—from competently or zealously representing his or her client. Thus NCAA Bylaw 12.3.2.1 is void, because it is against the public policy of the State of Ohio as well as every other state in this Union; (Murman Trial Testimony); and

Second, this rule is also arbitrary and capricious, because it does not impact a player's amateur status whatsoever, but, instead, limits the player's ability to effectively negotiate a contract that the Defendant NCAA allows the player to negotiate. (Karcher Trial Testimony.)

The Plaintiff respectfully requests that this Court enter a declaratory judgment that the Defendant NCAA's Bylaw 19.7²⁷⁶ is unenforceable for the following reasons:

²⁷⁵ This bylaw provides that:

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

NCAA Bylaw 12.3.2.1.

²⁷⁶ This bylaw provides that:

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Management Council may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions:

First, the Defendant NCAA's Bylaw 19.7 illegally interferes with the Ohio Constitution's delegation of all judicial power to the Courts of this State, and it exists solely to coerce or direct its agents and members to ignore court orders that are binding upon them as members of the Defendant NCAA; (Murman Trial Testimony) and

Second, as an unincorporated association, the Defendant NCAA cannot bypass this Court's injunctive orders by coercing or directing its agents and members from violating the same, because the Defendant

-
- (a.) Require that individual records and performances achieved during participation by such ineligible student athlete shall be vacated or stricken;
 - (b.) Require that team records and performances achieved during participation by such ineligible student-athlete shall be vacated or stricken;
 - (c.) Require that team victories achieved during participation by such ineligible student-athlete shall be abrogated and the games or events forfeited to the opposing institutions;
 - (d.) Require that individual awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
 - (e.) Require that team awards earned during participation by such ineligible student-athlete shall be returned to the Association, the sponsor or the competing institution supplying same;
 - (f.) Determine that the institution is ineligible for one or more NCAA championships in the sports and in the seasons in which such ineligible student-athlete participated;
 - (g.) Determine that the institution is ineligible for invitational and postseason meets and tournaments in the sports and in the seasons in which such ineligible student-athlete participated;
 - (h.) Require that the institution shall remit to the NCAA the institution's share of television receipts (other than the portion shared with other conference members.) for appearing on any live television series or program if such ineligible student-athlete participates in the contest(s) selected for such telecast, or if the Management Council concludes that the institution would not have been selected for such telecast but for the participation of such ineligible student-athlete during the season of the telecast; any such funds thus remitted shall be devoted to the NCAA postgraduate scholarship program; and
 - (i.) Require that the institution that has been represented in an NCAA championship by such a student-athlete shall be assessed a financial penalty as determined by the Committee on Infractions.
(Revised: 4/26/01 effective 8/1/01.)

NCAA Bylaw 19.7.

NCAA is nothing more than a collection of its members, who are bound by the same under basic partnership principles.

7. The Plaintiff Is Entitled to Injunctive Relief—

The presumptive remedy for interference with athletic eligibility in Ohio is an injunction. *E.g.*, *Scott v. Ohio High Sch. Athletic Ass'n*, No. 1999-CA-00269, 2000 WL 988532, *7–*8 (5th Dist., Stark July 10, 2000) (upholding preliminary injunction to participate in interscholastic athletics due to a finding of irreparable harm, and rejecting the argument that a lack of a right to participate on the team in the first instance precluded a finding of irreparable harm on being suspended there from).

This Court should grant the Plaintiff a permanent injunction, as specified below, for the following reasons:

First, the Plaintiff has shown a probability of success on the merits, to the extent that this Court found competent credible evidence to support the Plaintiff's claims, when it denied the Defendant NCAA's third Motion to Dismiss at the Trial;

Second, the Plaintiff will suffer immediate and irreparable harm, if this Court does not grant the injunctive relief sought herein, there is a certain threat of the same, and the Plaintiff's remedies at law are therefore inadequate for that reason; to the extent that the Plaintiff's damages can be calculated, they are still inadequate, since no amount of money can fully compensate the Plaintiff for the loss of his college baseball experience, which negatively impacts his teammates as well, or for the future impairment or loss of his future professional baseball career, both of which have intangible as well as tangible values to him.

This is also true with respect to the upcoming draft, where it is unlikely that the Plaintiff will be drafted in the first round, even though he is anticipated to be a first round draft pick, because unless he is seen playing, the scouts will not have sufficient information about his *current* playing abilities, which would cause immeasurable damages according to Professor Karcher, since this would then make it improbable, statistically, that the Plaintiff would ever make it to the major leagues. (Karcher Trial Testimony.)

In addition, and of great importance as recognized by this Court in granting the Plaintiff a TRO is the continuing and ongoing damage to the Plaintiff's reputation and baseball career, both amateur and professional, if this injunctive relief is not immediately granted. (Plaintiff's Trial Testimony.)

Third, whatever injuries could be suffered by the Defendant NCAA, if there are any at all, will not outweigh the potential—as well as ongoing—injuries being suffered by the Plaintiff absent injunctive relief. This Court must remember at Trial that not a single Defendant NCAA witness could identify any specific harm that would befall it other than the effect on its claimed right of self-determination. Compare this to that fact that it is OSU's position that the Plaintiff should have been fully reinstated by the Defendant NCAA without any conditions whatsoever. (Plaintiff's Exhibits 28 & 39–43.)

Finally, the public interest will be served by recognizing that college student-athletes have the right to counsel—a right now enjoyed by everyone else in Society.

As this Court knows, these four (4) factors represent a balancing test and are not individual essential elements. *See generally* Daniel J. Donnellon, *INJUNCTIONS AND RESTRAINING ORDERS IN OHIO*, § 3.03 (1992) (explaining rule).

For these reasons, this Court should enter a permanent injunction against the Defendant NCAA:

1. Enjoining the Defendant NCAA from trying to regulate the practice of law in Ohio;
2. Enjoining the Defendant NCAA from enforcing NCAA By-law 12.3.2.1;
3. Enjoining the Defendant NCAA from enforcing NCAA By-law 19.7;
4. Enjoining the Defendant NCAA from continuing to investigate the Plaintiff, since that investigation is premised upon illegally obtained and attorney-client privileged informa-

tion, and since that investigation violates the Plaintiff's contractual due process rights; and

5. Requiring the Defendant NCAA to vacate its findings underlying the suspension of the Plaintiff's athletic eligibility, and requiring it to reinstate the same immediately.

C. Conclusion—

In conclusion, and for the foregoing reasons, this Court should ISSUE Judgment in favor of the Plaintiff on Counts Three & Four of his First Amended Complaint, and this Court should set the remainder of the Plaintiff's Case for a Jury Trial at this Court's earliest convenience—*without* making any Civil Rule 54(B) finding, since there is no reason to allow the Defendant NCAA to appeal prior to this Court concluding this Case *in toto*.†

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